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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 370 (CM)

5 MATTHEW CONNOLLY  
6 and GAVIN CAMPBELL BLACK,

7 Defendants.

8 New York, N.Y.  
9 December 13, 2017  
10 9:45 a.m.

11 Before:

12 HON. COLLEEN MCMAHON

District Judge

13  
14 APPEARANCES

15 JOON H. KIM  
16 Acting United States Attorney for the  
17 Southern District of New York  
18 BY: D. BRITTAIN SHAW  
CHRISTOPHER JACKSON  
JESSEE ALEXANDER-HOEPPNER  
Assistant United States Attorneys

19 PAUL HASTINGS LLP  
20 Attorneys for Defendant Matthew Connolly  
21 BY: KENNETH BREEN  
PHARA GUBERMAN

22 LEVINE LEE LLP  
23 Attorneys for Defendant Gavin Campbell Black  
24 BY: SETH LEVINE  
SCOTT KLUGMAN  
MIRIAM ALINIKOFF  
AARON KARP

HCD7CONH

(Case called)

(In open court)

MS. SHAW: Brittain Shaw on behalf of the United States. With me at counsel table is trial attorney Christopher Jackson, trial attorney Jesse Alexander-Hoeppner, and legal assistants Claire Donohue and Martina Neeple.

THE COURT: OK.

MR. LEVINE: Good morning, your Honor. Seth Levine, Scott Klugman, Miriam Alinikoff and Aaron Karp for Mr. Black, I'm very pleased, your Honor, Mr. Black has made the trip and is here today; he's sitting on the end. And also at counsel table with us is Stephanie O'Connor, who is helping us, to the extent we need it, with technical assistance today.

THE COURT: OK, great.

MR. BREEN: Good morning, your Honor. Ken Breen and Phara Guberman for Matt Connolly, who is with us here in the courtroom.

THE COURT: Hi, Mr. Breen.

MR. BREEN: How are you.

THE COURT: OK. Since I think that we're going to end up mostly talking about matters other than what we were originally going to talk about -- and we have a lot of people here who will be going home on an afternoon train -- will you excuse me for one moment.

OK, so let me tell you where I am. I would say I'm

HCD7CONH

1 woefully -- first of all, welcome to the taint team -- I'm  
2 woefully unprepared because I got the exhibits to @agent Weeks'  
3 affidavit like at 4:10 yesterday afternoon. I had many other  
4 things on the calendar and I have not reviewed them.

5 Now, what that means is that Mr. Levine is going to  
6 get the first crack at shaping how I'm going to think about  
7 them, but you should just be aware of that.

8 I have read all of the affidavits, most of which I was  
9 able to print off. If we're going to talk about grand jury  
10 material, obviously we're going to have to do that in a closed  
11 courtroom. But good morning.

12 I assume that you are going to put in your affidavits,  
13 your exhibits and you're going to rest.

14 MS. SHAW: Yes, your Honor.

15 THE COURT: That's at least what you told me in a  
16 letter.

17 MS. SHAW: Well, with respect to putting in the  
18 affidavit, absolutely, your Honor. As we indicated in our  
19 letter, we were proceeding today by affidavit. Clearly we're  
20 not resting at this time because we still await Mr. Prange's  
21 testimony in January.

22 THE COURT: Correct.

23 MS. SHAW: And certainly one can't predict -- I can  
24 somewhat predict, but in any event we would still have the  
25 opportunity to supplement following any cross or any case put

HCD7CONH

1 forward by the defendant.

2 THE COURT: Well, I don't know, but perhaps you're not  
3 familiar with the concept of resting. One rests after one puts  
4 forward one's case. One's rebuttal case does not require that  
5 one not rest after putting in one's case.

6 I agree you have the one witness in reserve who is  
7 going to testify, and he's going to testify in January, because  
8 that's when he can be here, and I am deeply grateful to our  
9 British friends for freeing him up to come over in January, but  
10 aside from that, as far as I'm concerned, based on what you've  
11 told me, you're resting. Whether you have a rebuttal case  
12 after Mr. Levine does whatever he does, that's up to you.

13 MS. SHAW: Yes, your Honor. For today we're  
14 proceeding by affidavits, and we would submit that the  
15 affidavits, as your Honor had requested, attest that there has  
16 been no exposure to any of the trial team, any former trial  
17 attorneys, and no exposure to agent Weeks. So, in addition,  
18 special agent Weeks sets forth a legitimate independent basis  
19 for each point in his grand jury testimony.

20 THE COURT: Which I can't discuss in an open  
21 courtroom. I know he says it, and I just haven't gone through  
22 the, I don't know, 500 pages of exhibits that didn't accompany  
23 the affidavit but that arrived at 4:10 yesterday afternoon.

24 MS. SHAW: Apologies, your Honor.

25 THE COURT: OK, fine. Mr. Levine, good morning.

HCD7CONH

1 MR. LEVINE: Good morning, your Honor. Thank you for  
2 hearing us.

3 So, your Honor, obviously we're having a hearing  
4 without a witness, so that's less dramatic than we had hoped,  
5 but I think --

6 THE COURT: This is not about drama, Mr. Levine.  
7 Whatever else this is about, it's not about drama.

8 MR. LEVINE: I think the issue for today is how you  
9 would like me to proceed. I understand the government has now  
10 offered these affidavits. The taint team and Mr. Black's  
11 counsel, we worked hard together to work through things. I am  
12 happy to reserve all --

13 THE COURT: What is it that -- putting Mr. Prange to  
14 one side, what is it that you would do? Are there some of  
15 these folks whom you would like to cross-examine and you can  
16 convince me that there is a reason to cross-examine them?

17 MR. LEVINE: Well, your Honor, I think that there is a  
18 couple of different issues in that respect. Let me say the  
19 following: I believe that, first of all, Mr. Prange, or other  
20 people from the FCA who I will talk about in a moment, are  
21 central, as your opinion says, to understanding this, for the  
22 simple reason that -- and this is something that frankly we are  
23 going to get into with Mr. Prange and get into it today.

24 The premise of this hearing is the government has said  
25 to you that there was a wall erected between the trial team at

HCD7CONH

1 least, members of the Department of Justice, other than my  
2 friends that are sitting at the front table, and folks that had  
3 access to Mr. Black's compelled testimony, whether that be in a  
4 government organization or otherwise.

5 Your Honor, it's our contention -- and I don't think  
6 there is anything to refute that -- that there has been not a  
7 single piece of evidence proffered in the government's case to  
8 you to establish such a wall.

9 THE COURT: Now, Mr. Levine, how can you say that? I  
10 have 20 some odd -- 31 people who have sworn under oath,  
11 declared on oath that they were behind a wall, that they were  
12 in no manner, shape or form exposed to the testimony of  
13 Mr. Black.

14 MR. LEVINE: Well, I actually don't know that that's  
15 what they say. What they say mostly -- and there are some  
16 differences, but they didn't read it, and they don't say  
17 anything in fact, in any of these affidavits, whatsoever, not a  
18 word, about who people talked to and what the interactions  
19 were.

20 Now, Judge, I'm happy to do this today or can I do it  
21 on the 22nd, but I will be happy to prove to your Honor that  
22 the extent of the interaction between these agencies was not  
23 what has previously been proffered to you as they didn't talk,  
24 they issued settlements on the same day, they didn't share any  
25 paperwork but they really weren't involved with each other.

HCD7CONH

1 That story -- which underlies this entire thing -- is false.

2 We now have many documents that prove that, and prove  
3 that many of the representations that have been made to this  
4 court about the nature of this "wall" are, to be kind,  
5 inaccurate.

6 Now, I know the court has not had a chance to read  
7 everything as closely, as you said. There is not a single word  
8 in these affidavits about the wall other than a reference in a  
9 couple of affidavits -- Ms. Saulino, Ms. Anderson, who is on  
10 the trial team -- that says there was a wall.

11 I know this court is quite aware that a wall  
12 concept -- whether it's under legal rules or banking rules --  
13 is under the ABO rules a screen -- which is how it's defined in  
14 model rules -- is defined as something that isolates in that  
15 case a lawyer from all information, and that is done commonly  
16 through physical proximity, through --

17 THE COURT: Lack of physical proximity.

18 MR. LEVINE: -- lack of physical proximity, through  
19 various other procedures and methods, to ensure that there is  
20 no communication through a person that might have whether it's  
21 a conflict or taint and someone else. It's a common procedure;  
22 I know the court is well aware of them. Firms use them all the  
23 time.

24 What that requires is a procedure. It requires  
25 notification. It requires logging and notice of where

HCD7CONH

1 materials went. It requires people being told not to  
2 communicate.

3 What you have here is nothing in these affidavits  
4 about lack of communication. In fact, all you have from  
5 Ms. Anderson and Ms. Saulino is that we told people at the FCA  
6 to not tell us.

7 The reason you don't have anything, Judge, is because  
8 there is no wall. The only wall there is here is the  
9 equivalent of the following gesture: Don't tell me what you  
10 know, as you sit next to me in meetings, on phone calls, in a  
11 joint conference between the FCA, the SFO and the Department of  
12 Justice, which a dozen DOJ folks went over, as we understand it  
13 from the documents, and talked. They have unbelievable numbers  
14 of contacts, Judge, about everything in this case, and the only  
15 thing you see is them telling Mr. Prange, well, let's structure  
16 this investigation in a way that you can say you didn't tell me  
17 anything.

18 Now, the government has every right to prove that  
19 there is a wall, but there is no proof here of any wall  
20 whatsoever. There is a reference to it. I have asked for  
21 instructions. I've asked for how did you physically separate  
22 these people. I don't believe that any of my friends at this  
23 front table are going to stand up and tell you that Mr. Meaney,  
24 Mr. Prange, Mr. Salame, Mr. King, the people that were involved  
25 in the FCA and others, did not have regular contact with the



HCD7CONH

1 trial team and other members of the Department of Justice in  
2 the United States, in London, that they had frequent meetings.

3 THE COURT: And what difference would that make unless  
4 there were some evidence that they shared the content of  
5 Mr. Black's compelled testimony, which, by the way, I have  
6 read? That is one of the things I have read.

7 MR. LEVINE: And I think, your Honor, that there is  
8 such evidence that Mr. Prange -- and we will hear from him --  
9 sat with Mr. King and debriefed him, having first -- contrary  
10 to what you have been told -- I'm happy to show you the  
11 documents -- exchanged documents with the government, planned  
12 out how to do the King proffer, and they had constant contact  
13 back and forth where they discussed every aspect of this case  
14 and how to manage it, and how to manage each other's own  
15 issues.

16 So, the notion that what you had here was two separate  
17 teams that happened to just cross in the night and Mr. Prange  
18 showed up in a room one day, these affidavits don't talk to you  
19 about that at all.

20 THE COURT: Well, one of the things that's occurred to  
21 me -- and I would like it -- I will tell you what I would like  
22 to do. I would like to spend the next two hours with you, and  
23 I would like -- and then possibly again tomorrow morning, if we  
24 need to -- but I would like you to put in whatever documents,  
25 and I would like you to explain to me what you think those

HCD7CONH

documents show.

MR. LEVINE: Sure.

THE COURT: But I accept as a given the fact that there was communication between the Justice Department, the FCA and the SFO in the course -- extensive communication -- in the course of this investigation.

What has to be shown in order to demonstrate a violation of Kastigar is that Mr. Black's compelled testimony was the basis of some action taken by the government in connection with the case against him here and there was no independent source.

And I will tell you, having read Mr. Black's compelled testimony, that I think for almost all points it will be fairly easy for the government to demonstrate an independent force. It's not like his story in his compelled testimony was so different in any respect than the stories of other people who proffered to the government, who have turned on your client and intend to testify against him.

MR. LEVINE: Well, your Honor, I guess I'd have to say that one problem with that is that all those folks came in to talk to the government after they heard my client's compelled testimony.

THE COURT: Not according to the list they gave me. According to the list they gave me, one person came in to talk after that.

HCD7CONH

1 MR. LEVINE: Well, we think, your Honor, that  
2 Mr. King's testimony and Mr. Curtler's testimony is in fact  
3 tainted, and we think that, therefore, the grand jury  
4 proceedings are tainted.

5 We think that Mr. -- and a lot of this frankly I  
6 think, your Honor, is going to be more sensible to come in  
7 through Mr. Prange, because you'll see it all. But let me  
8 raise with you another issue that came to our attention this  
9 morning as I walked into the courtroom.

10 So, one of the things that we and the taint team have  
11 done is we have demanded unsurprisingly discovery, and we have  
12 had discovery provided to us. One of the big issues obviously  
13 we were looking for is not only Jencks Act material but Brady  
14 and Giglio.

15 You have an affidavit before you, your Honor, from  
16 Mr. Meaney from the FCA. Well, there are a lot of problems  
17 with Mr. Meaney's affidavit, in fact, problems that we would  
18 suggest suggest it can't even be received by the court, along  
19 with some of the other affidavits. But that sort of pales in  
20 comparison to the fact that I was handed a 302 -- or sent -- I  
21 don't even have a copy of it, Judge. I just have it on my  
22 iPad -- which the taint team tells me was overlooked, which  
23 recounts --

24 THE COURT: Oh, there is Mr. Meaney's affidavit.

25 MR. LEVINE: So Mr. Meaney has two things, your Honor.

HCD7CONH

1 If you recall, when the Kastigar motion was initially filed,  
2 the government submitted to yo a letter from Mr. Meaney, and  
3 then they also submitted to you an affidavit very recently.  
4 The letter -- which I can put up on the screen, if you like --

5 THE COURT: Sure.

6 MR. LEVINE: -- was dated in August.

7 THE COURT: I've got it.

8 MR. LEVINE: So, this is the initial letter, but let  
9 me just tell what you his 302 says.

10 If you look at this letter and you look at the second  
11 paragraph, Judge -- and this is the letter that the government  
12 told you you should not hold a Kastigar hearing because of,  
13 because, after all, you have the letter and this is the FCA and  
14 what's all this bother about -- well, Mr. Meaney told you in  
15 the last line of the second paragraph, "We provided a copy of  
16 Mr. Black's interview to the United Kingdom's Serious Fraud  
17 Office on January 23, 2017." He also told you in the beginning  
18 of that paragraph, "We have not provided any compelled  
19 testimony to Mr. Black other than a copy of his own transcript.  
20 We have not provided Mr. Black's transcript to any other  
21 Deutsche Bank's individuals apart from Mr. Black." It seems  
22 pretty categorical to me, your Honor.

23 He also told you on paragraph 4, that he hadn't even  
24 provided a copy of Mr. Black's testimony to DOJ. And he then  
25 told you on the last page -- or he told Ms. Shaw -- that oh, by

HCD7CONH

1 the way, I understand this is to be submitted to a court, so I  
2 know this is not some casual communication; this is serious  
3 communication. And the government relied on it.

4 Well, your Honor, if you actually look at Mr. Meaney's  
5 affidavit that he put in the other day, it turns out there is a  
6 lot of stuff in this letter that wasn't quite accurate.

7 For example, it is not true that the SFO was provided  
8 the testimony in 2017. In fact, based on both Mr. Meaney's new  
9 affidavit and the SFO affidavit, which was also put in, they  
10 provided that testimony way back in 2015, in fact before the  
11 grand jury even met in this matter.

12 MS. SHAW: Your Honor, may I just interject for a  
13 moment?

14 THE COURT: No, you may not. You may make notes  
15 because you're going to respond to this, but I want to go  
16 through this argument about this document and this affidavit,  
17 and then I will hear you.

18 MS. SHAW: I understand, your Honor. It's just this  
19 document is under seal under the court's order, and I just  
20 wanted to raise that since we're speaking in open court.

21 MR. LEVINE: I apologize.

22 THE COURT: Then we're going to have to clear the  
23 courtroom. I have to clear the courtroom. Sorry. We have a  
24 bunch of documents that have grand jury material. And the  
25 first thing I will do is I will talk to them about whether this

HCD7CONH

1 has to remain under seal.

2 You can stay. You have a client in this case.

3 MR. BREEN: Yes. But there are members of my team who  
4 here as well.

5 THE COURT: Everybody else has to go.

6 UNIDENTIFIED SPEAKER: Your Honor, I'm an attorney  
7 with Portfolio Media, Inc.

8 THE COURT: Sir, you are here as a representative of  
9 the press; you are not a party to the case. I'm going to have  
10 to ask you to leave while I conduct an inquiry. Do you mind?

11 UNIDENTIFIED SPEAKER: I will of course abide by any  
12 and all of your Honor's directives. I just wanted to state my  
13 client's position that I understand the court has issued  
14 sealing orders, that this is in connection with the sealing  
15 orders the court has already issued. As I understand, what is  
16 about to happen is discussion about documents that are  
17 currently filed under seal. We ask that the courtroom be  
18 promptly reopened as soon as all matters concerning --

19 THE COURT: Oh, trust me, it will be.

20 UNIDENTIFIED SPEAKER: And the last thing I will say  
21 is we reserve all of our rights with regard to --

22 THE COURT: And you reserve all of your rights.

23 UNIDENTIFIED SPEAKER: Thank you so much.

24 THE COURT: Now, Mr. Breen, the members of your team,  
25 the member of Mr. Levine's team, are perfectly welcome to stay;

HCD7CONH

everybody else goes.

MR. BREEN: Thank you, your Honor.

(Pages 16 through 20 are sealed)

HCD7CONH

1 (In open court)

2 THE COURT: Welcome back.

3 MR. LEVINE: So, your Honor, I was directing your  
4 attention to this letter, which we can put back up. This  
5 letter, I just want to orient the court, this letter came into  
6 as part of the initial Kastigar briefing, and I think there is  
7 no objection to this letter.

8 MS. SHAW: No.

9 MR. LEVINE: Thank you very much. I want to be  
10 careful and respectful here.

11 So, your Honor, you have this letter. I would take it  
12 that the FCA submitting a letter to this court would have been  
13 quite careful in making sure that they were being scrupulously  
14 accurate about what they told you. It turns out that that  
15 absolutely was not the case.

16 Mr. Meaney's affidavit makes perfectly plain -- as  
17 does the affidavit from the SFO, which was put in also, which  
18 is Government Exhibit 33 -- that in fact disclosure was made in  
19 2015. That is, as I said, important because the grand jury  
20 here, of course, met in '16. Therefore, the letter from the  
21 FCA initially that the court had to deal with suggested at  
22 least the possibility of taint of the grand jury might be more  
23 remote because the disclosure occurred after the grand jury had  
24 already met. So, that's the first problem with the affidavit.

25 The affidavit also then goes on -- Mr. Meaney's



HCD7CONH

1 affidavit -- to talk about giving this testimony apparently to  
2 a taint team at the SFO. I have tried to check around a little  
3 bit since we have the affidavit, and I'm not familiar with the  
4 SFO having taint teams. I could be wrong.

5 THE COURT: Possibly they had to invent them for this  
6 very matter.

7 MR. LEVINE: They could, your Honor. I noticed in the  
8 affidavit 33 of Lois van der Skratten that she makes no mention  
9 of a taint team whatsoever, and it's also curious that that is  
10 a particularly American phrase, taint team. So, I don't know  
11 where that comes from or why the SFO would not have mentioned  
12 that to your Honor.

13 THE COURT: The government may be in some position to  
14 enlighten us or Mr. Prange might be in some position to  
15 enlighten us.

16 MR. LEVINE: That's true, your Honor.

17 So, those problems, and the fact that --

18 THE COURT: I note the inconsistency.

19 MR. LEVINE: And also, your Honor, the fact that  
20 Mr. Meaney when he prepared this letter to you didn't bother to  
21 tell you that, hey, of course I provided this testimony to the  
22 taint team. While one might think is an oversight, given the  
23 delicate diplomatic negotiations that have occurred to allow  
24 this document to even be proffered to the court, and the fact  
25 that it was being proffered in unsworn form, would have

HCD7CONH

1 suggested to me that the authors would have been careful,  
2 because, after all, we're dealing with serious business here  
3 about the rights of one of their own citizens.

4 But that's not the only concern that I have about what  
5 I think will be a theme of mine throughout this hearing, which  
6 is not only is it not careful, it is not really consistent with  
7 a full story of what has happened.

8 But to finish off the "it's not careful" part, your  
9 Honor, the affidavit of Mr. Meaney, the affidavit of Ms. von  
10 der Skratten, the affidavit of Mr. Curtler the cooperator and  
11 Mr. King are actually invalid under U.S. law.

12 You ordered these folks to put in a sworn statement.  
13 They are permitted under 1746 to put in a sworn statement,  
14 substitute of a declaration, but the statute requires that they  
15 attest that they are committing to the penalty of perjury under  
16 the laws of the United States if they are signing the  
17 declaration from without the United States.

18 You will note on Mr. Meaney's declaration he uses no  
19 such language. Now, if this was an affidavit attaching some  
20 documents by a lawyer, or a declaration attaching some  
21 documents by a lawyer, or if this was not essentially being  
22 proffered to you as a testimonial substitute, perhaps these  
23 kinds of points could be simply ignored.

24 THE COURT: OK. So, your problem is that Mr. Meaney  
25 says only I declare under penalty of perjury that the foregoing

HCD7CONH

1 is true and correct. That's offensive to you; that doesn't cut  
2 it.

3 MR. LEVINE: It doesn't. The statute, your Honor,  
4 says if a declaration is executed without the United States, I  
5 declare, certify or verify under penalty of perjury and the  
6 laws of the United States of America that the following is true  
7 and correct.

8 THE COURT: OK. So, it's the omission of "under the  
9 laws of the United States of America," so we should indict them  
10 for 1001.

11 MR. LEVINE: No, your Honor. I'm not looking to  
12 penalize Mr. Meaney at this point at least. I am looking,  
13 however, to point out to the court that we've got four  
14 testimonial affidavits submitted from London that were  
15 apparently the subject of great back and forth between our  
16 nation and another, and after the declarations from cooperators  
17 whose credibility is certainly at issue, and for whatever  
18 reason Mr. Meaney's declaration, the SFO's declaration, doesn't  
19 even conform with the law.

20 Now, I understand, your Honor, that those in other  
21 contexts might not be the biggest points -- and they're not the  
22 biggest points here -- but my point to you, Judge, is that this  
23 business requires precision; it requires saying how do we cabin  
24 and isolate information; and they're asking you to take the  
25 word of a lot of folks that we don't know and you don't know

HCD7CONH

1 because they have letterhead from agencies and they carry  
2 badges and they carry credentials.

3 Well, fair enough, they're entitled to do that, but  
4 I'm not entitled and my client is not required to take the word  
5 of folks when between the Department of Justice, the FCA and  
6 the SFO, they can't file a proper declaration. And if that  
7 were the only issue, then I wouldn't be saying anything about  
8 this, because it would be a technical issue.

9 But what is the explanation for why Mr. Meaney told  
10 you in his letter that the transcripts weren't provided until  
11 2017?

12 And I will ask you another question, your Honor, which  
13 I think is more pertinent: When did the United States  
14 Department of Justice learn that Mr. Meaney's letter was  
15 inaccurate in a material way? And why didn't they tell you?  
16 Why didn't they come to this court and say, you know what, Mr.  
17 Meaney, he just made a mistake, he made a mistake, he should  
18 have said 2015, we regret it, no big deal. That's fine, people  
19 make mistakes all the time.

20 But here I'm standing here today in a Kastigar  
21 hearing -- which I had to win over the objections, the very  
22 forceful objections of my friends in the front row -- and they  
23 didn't tell you that their main person from the FCA got it  
24 wrong.

25 That raises to me at least the question -- I'm not

HCD7CONH

1 attributing any intentionality. I'm just saying that doesn't  
2 give me great comfort that what has happened here is entirely  
3 clear.

4 Now, this morning as I walked into court -- and I  
5 appreciate that I got it at least while I was walking in, and  
6 there isn't even a paper copy -- and because the court was so  
7 gracious to allow us to have electronic devices, I have been  
8 able to pull it up on my iPad -- a 302 report of Mr. Meaney who  
9 apparently has been interviewed three times starting on  
10 November 29, on December 1 and December 8 of this year. I have  
11 received no such report of an interview with him prior to his  
12 submitting that letter, which surprises me a little bit,  
13 because I would have thought that the United States would have  
14 done something to verify the contents of a letter being  
15 submitted to your Honor. I have no information on that.

16 We have also asked for the notes of these meetings,  
17 although Mr. Jackson has told me that they will consider it,  
18 but that they're not in a position to provide those yet. I  
19 think the agent is sitting in the courtroom, and perhaps he has  
20 them.

21 In this remarkable document, your Honor, it says that  
22 during one of these meetings Meaney initially advised the FCA  
23 provided the transcripts of Gavin Black's compelled testimony  
24 to a lawyer at Slaughter and May -- I will leave her name out;  
25 there is no reason for that -- who is Deutsche Bank's UK

HCD7CONH

1 counsel. Meaney believed that the FCA began turning documents  
2 over to the defense sometime late in 2014, but he was advised  
3 he would attempt to find out the exact date the Black  
4 transcript was given to this lawyer.

5 Well, your Honor, that was at the earliest November  
6 29, 2017. Months earlier, Mr. Meaney had told you this didn't  
7 happen at all -- at all -- and he told you that it didn't  
8 happen in 2017.

9 THE COURT: Well, it tells me in this newest affidavit  
10 he doesn't indicate that it happened.

11 MR. LEVINE: Let me finish, because we have a turn in  
12 the plot here. There is then in the 302 -- and I just read it  
13 quickly this morning -- additional interviews and additional  
14 inquiries made. Another member of the FCA is tasked to  
15 actually go figure out who has this and when did we give it to  
16 people. And it turns out that they say in the end we didn't  
17 give it to Slaughter and May; sorry I was wrong. And they  
18 reviewed some set of records. In fact, they had to call  
19 Slaughter and ask them. They then also had to ask the Serious  
20 Frauds Office when they got the transcript, because apparently  
21 it wasn't clear to the FCA when they had given it. And this  
22 was all very confusing, this compelled testimony that only has  
23 my client's constitutional rights in the balance. Nobody seems  
24 to know where it was. And I can't tell you the end of the  
25 document.

HCD7CONH

1 THE COURT: And I must say I appreciate your most  
2 recent statements but, remember, despite all the warnings that  
3 come from the western side of the Pond to the eastern side of  
4 the Pond, he has no such rights in England.

5 MR. LEVINE: Well, your Honor, actually he does in the  
6 following sense: Compelled testimony in the United Kingdom by  
7 the FCA is not admissible against Mr. Black in a criminal  
8 proceeding in the United Kingdom.

9 So, their rules are a little different, but one of the  
10 reasons that the FCA is able to compel, as has been explained  
11 to us, is that it cannot be used against him in a criminal  
12 proceeding. So, while they do not have our Fifth Amendment the  
13 way that we have it, it is compelled in the United Kingdom, and  
14 it is compelled in a way that does actually grant Mr. Black  
15 very substantive rights to not have criminal prosecution  
16 brought against him based on this. So, I do think, your Honor,  
17 that that is an important point.

18 THE COURT: OK.

19 MR. LEVINE: My only point is we then encounter  
20 another problem, which I'm going to come back to, which is  
21 there are vast number of documents that were produced to me  
22 that involve communications with the FCA, the SFO, with Paul  
23 Weiss, that have enormous redactions, so I can't even figure  
24 out what the communications are, because they will have a very  
25 tantalizing title and then they're all redacted out.

HCD7CONH

1 I don't know what the end of the story here is with  
2 Mr. Meaney. I also know that when they submitted an affidavit  
3 to you, your Honor -- turning to Mr. Meaney's affidavit -- just  
4 a few days ago, they made no mention of the fact that Mr.  
5 Meaney had made a statement to them after he submitted a letter  
6 to you that basically says, oh, by the way, what I said before  
7 wasn't true either about the date or about who got the stuff,  
8 who got the transcript, so forgive me.

9 THE COURT: Possibly they knew that you would tell me.

10 MR. LEVINE: Well, except, your Honor, they put in  
11 this declaration -- and I got this 302 this morning, and I  
12 actually don't attribute ill motive to the taint team. They  
13 have told me it's an oversight; I accept their  
14 representation -- but what I'm saying to you, Judge, is we  
15 haven't even started yet with what happened here with this  
16 information and how information was passed. We've got the lead  
17 person from the FCA, OK, sending you a letter that's inaccurate  
18 in multiple ways, making a representation on the crucial issue  
19 of who got this document. It can't be casual. He is being  
20 called by two trial attorneys from the Department of Justice on  
21 a matter that he has already made, as the government has told  
22 you, an extraordinary submission, and it's just wrong. I mean  
23 wrong in the sense of inaccurate.

24 So the question I have for you -- and now I have an  
25 affidavit which for some curious reason is not ascribed in the



HCD7CONH

1 appropriate way. Now, I don't know if that is just simply an  
2 oversight that nobody bothers to read the rules. That could  
3 be.

4 THE COURT: I'm going to guess that's what it is.

5 MR. LEVINE: It doesn't matter to me. What matters to  
6 me is this: I've got somebody that says I can't even figure  
7 out who we gave this thing to. And I will show you the  
8 Department of Justice own guidelines in the U.S. Attorney's  
9 manual -- which is read by less people than perhaps it should  
10 be -- talks about the need to isolate materials, and one of  
11 their rules is you need to have the testimony of a compelled  
12 person in a secure place. What these affidavits say to me is  
13 whatever happened here was ad hoc, not secured, and people  
14 don't know what they're talking about.

15 Now, your Honor, I would certainly understand if  
16 Mr. Meaney was called out of the blue by these folks, but he  
17 wasn't.

18 THE COURT: Mr. Levine, you aren't suggesting that the  
19 FCA or the SFO in Great Britain are bound by rules of the  
20 United States Department of Justice for how the United States  
21 Department of Justice handles --

22 I'm sure that -- well, I'm not sure. I'm not sure of  
23 anything. I would hope that the taint team which has a copy of  
24 Mr. Black's testimony has it in a secure facility and that it  
25 is not being stored in the same office as the office where the

HCD7CONH

1 trial team is working. In that event, they would be complying  
2 with the United States Attorney's manual.

3 So, I mean you have a wonderful fascinating habit of  
4 introducing red herrings into this.

5 MR. LEVINE: Well, your Honor, I think, first of all,  
6 my understanding is that the taint team and the trial team are  
7 not only in the fraud section, in the same building and  
8 actually are not separated.

9 And one of the points I'm going to make to you is I  
10 don't even understand today that this taint team -- the taint  
11 team that I'm familiar with from my days in the office was you  
12 generally had somebody in a different section who had a  
13 different chain of command who didn't talk to you.

14 These guys are in the Bond building, working on cases  
15 right now with the trial team, some of them involving Deutsche  
16 Bank and the FCA. There is no separation here at all. That's  
17 why I said there is no wall.

18 There is no wall either between the FCA and the  
19 Justice Department, and there is no wall that I can see --  
20 because they won't give me any information about it -- with  
21 even this taint team. These guys are colleagues.

22 I'm not accusing them of anything at all. I'm just  
23 saying the fraud section is doing the investigation of the  
24 case, and therefore we're going to use the forfeiture section  
25 to do the taint team, which I know in another situation I have

HCD7CONH

1 in the Eastern District that's how they're doing it. We don't  
2 have that here, Judge.

3 The reason I raise this -- and I respectfully don't  
4 think it's a red herring -- is because what evidence is before  
5 you about the operation of either this taint team or the  
6 operation of the wall?

7 I will tell you -- and every brief that's been filed  
8 in this matter from the taint team and from the prosecution  
9 team is signed under the same supervisor. She is one of the  
10 affiants here. Now, she is head of the fraud section, but  
11 there is no separation that I can see. If there is one, fine.  
12 What is it? Because I will tell you in the documents they  
13 produced to us one of the members of this prosecution team is  
14 currently investigating Deutsche Bank on another matter and  
15 interacting with the FCA with two of the members of the trial  
16 team.

17 Now I'm not suggesting for a second that there might  
18 not be something in place, but when you look at what a screen  
19 means -- certainly for a law firm who is familiar if you don't  
20 screen people properly, you lose your client and get  
21 disqualified -- this doesn't look like that.

22 So what I say as my first point, Judge -- and  
23 following up on the Meaney affidavit -- is that you do not see  
24 things this court should take confidence in because you're  
25 following the procedures, the best practices that are

HCD7CONH

1 necessary, to support the finding of a robust and thorough  
2 screen. And if you can't be confident of that, then I would  
3 respectfully suggest that the heavy burden here can't be met.

4 You say in your opinion, I believe on page 22, that  
5 one of the reasons Mr. Prange needs to come here is he needs to  
6 account for his contacts with the Department of Justice between  
7 the time of the compelled testimony and the time of the grand  
8 jury indictment, and for trial, first time for all time up  
9 until and after the trial.

10 They can't do that -- and they haven't done it in any  
11 of their affidavits -- because what they're going to tell you  
12 is these people are talking all the time, and they're  
13 interacting all the time, including discussing how they  
14 structure interviews with people so Mr. Prange doesn't ask  
15 questions that might get the compelled testimony out, even  
16 though the government is going to be not there but hearing  
17 about it later.

18 There is no wall at all. And on that basis, on that  
19 structural basis, I believe the court should find alone that  
20 there is not any Kastigar protection.

21 So, when you say to me, you know, Mr. Levine, it's  
22 just a silly declaration the guy said under oath, said under  
23 penalty of perjury, you're right, Judge. Is it going to be an  
24 abuse of discretion if you let it in? No, it's not. But it  
25 should very, very seriously make you think, I respectfully

HCD7CONH

1 submit, that what has happened here is that the guy in the FCA  
2 can't even tell you when he gave the testimony, and he has said  
3 on a call with an F.B.I. agent in the last two weeks, hey, we  
4 gave this stuff to Slaughter and May, and then for some unknown  
5 reason he has now changed his story again.

6 I've asked him for all the documents that refreshed  
7 witnesses' recollection in this matter. They told me I can't  
8 have them because I can't have them. OK, well, then under 612  
9 I move that this affidavit shouldn't come in, because this guy  
10 has clearly gone one way and then the other, he has told you  
11 five different things that aren't true; they won't tell me what  
12 refreshed his recollection; I don't think that this affidavit  
13 has any competence because it's invalid; strike it.

14 So, I think that's the first point we would make, that  
15 there is no evidence of a wall and there is no evidence that  
16 this affidavit is not right.

17 Now, we will not get into right now Mr. Meaney's  
18 statements about the relationship between Mr. Black's testimony  
19 and the FCA notice. I will say this though -- and I will show  
20 this to you --

21 THE COURT: Well, is it time for us to discuss that?  
22 Because that material needs to remain under seal, we would  
23 clear the courtroom and the press.

24 MR. LEVINE: I would really like to -- I think --

25 THE COURT: You want to wait.

HCD7CONH

1 MR. LEVINE: Here is the problem I have, your Honor.  
2 You offered me a hearing with Mr. Prange. I don't think I  
3 should have to try my case before I see somebody live. Because  
4 I am very concerned -- with all respect, and I'll show you  
5 why -- that there has been a lot of representations made to  
6 this court on a lot of topics that are just flat not true, and  
7 I think it's going to change your view of how you look at all  
8 of these affidavits. This is the first one.

9 THE COURT: I hear you. And your argument is an  
10 argument that I think goes to the weight. I'm not going to  
11 strike the affidavit. You knew I was not going to strike the  
12 affidavit. But it goes to the weight, unquestionably goes to  
13 the weight.

14 But I remind you that the Second Circuit in Allen  
15 found a Kastigar violation because the key witness in front of  
16 the grand jury testified that the only source of information  
17 that he had about certain matters as to which he testified  
18 before the grand jury apparently was the compelled testimony of  
19 the two defendants. It didn't rule that a wall was missing  
20 bricks, or the failure to adhere strictly to the Federal Rules  
21 of Evidence or to the U.S. Attorney's manual or anything like  
22 that rose to the level of a Kastigar violation.

23 And I think you can take it on faith that whatever I'm  
24 going to do, I'm not going to extend what the Second Circuit  
25 held in Allen. I'm bound by what the Second Circuit held in

HCD7CONH

1 Allen, but I'm not going to broaden that in any way.

2 So, I accept your argument insofar as it goes to the  
3 weight. I'm annoyed -- we will use that word -- by the fact  
4 that there is an obvious inconsistency between information that  
5 I was given by this individual Mr. Meaney last August and  
6 information that I am being given by this individual Mr. Meaney  
7 when he is now under oath in December, but it's an argument  
8 that goes to the weight. In the end what the government has to  
9 establish is that nobody was in fact exposed --

10 MR. LEVINE: Your Honor --

11 THE COURT: -- even if the wall was just a hedge.

12 MR. LEVINE: I don't think it was even that; I don't  
13 think it exists at all.

14 But, look, your Honor, I hear what you're saying. I  
15 think everything I'm going to argue in this hearing fits very  
16 comfortably within Allen which, of course, as your opinion  
17 points out, there is direct taint, which is easier. But here  
18 we are talking about indirect taint.

19 THE COURT: Yes, it's much easier.

20 MR. LEVINE: And here, your Honor -- look, frankly, I  
21 think if Mr. Meaney's affidavit is going to be taken, he should  
22 have to come here and bear witness. I think that the man has  
23 told so many stories, I can't even keep track of them, and if  
24 Mr. Meaney doesn't want to bear witness, I don't think the  
25 court should take anything he has to say very seriously,

HCD7CONH

1 because he obviously doesn't care very much about what he says  
2 to this court.

3 And I must say I am surprised -- unhappily surprised,  
4 frankly -- to see that we have such a lack of -- at best a  
5 total lack of care in preparing these things. Whether I'm  
6 right or wrong about taint doesn't matter. We should not be  
7 guessing about any of this.

8 I understand what the court's ruling is. I don't  
9 think that there is anything I'm asking for -- because here is  
10 the problem. Meaney, Prange, King, the whole bunch of them,  
11 are in constant communication with DOJ. And, your Honor -- and  
12 I will get to this in a second -- they have made  
13 representations to you about what those communications were.  
14 And those representations are: We didn't strategize, we did  
15 not share settlement paperwork, we stayed away from compelled  
16 kinds of information. So, if those statements aren't true,  
17 then the entire premise here begins to fall away. And I think  
18 that's in fact what is going to happen.

19 I'm going to address those things, but first I want to  
20 address the cooperators, because they also have the same  
21 problems with their affidavits. And what is more troubling --  
22 especially about Mr. Curtler's affidavit -- is that  
23 Mr. Curtler's affidavit -- which is one of these sort of plain  
24 vanilla nothing happened, I don't know anything -- he also  
25 submitted a supplemental affidavit. Have you seen that, Judge?



HCD7CONH

1 They submitted a supplemental declaration for Mr. Curtler last  
2 night. Have you seen that?

3 THE COURT: No, I have not seen it.

4 MR. LEVINE: Oh. Well, I'm happy to hand one up to  
5 you, if you'd like, your Honor. May I approach?

6 THE COURT: Yes.

7 MR. LEVINE: This is Government's 4A. We received it  
8 yesterday evening quite late.

9 So, Mr. Curtler told you that, again, I haven't seen  
10 anything, except I did review, I got the Hayes transcript, but  
11 that's it, trust me on that.

12 His affidavit is also improperly ascribed. But  
13 apparently somehow miraculously last night Mr. Curtler got  
14 refreshed; he actually had a copy of the trial transcript in  
15 what is called a brokers trial in London.

16 This is paragraph 4. We can put it up on the screen,  
17 4A. A lot of people are having some last-minute recollections  
18 here. And this affidavit -- also improperly ascribed -- tells  
19 us that I have since had my recollection refreshed -- this is  
20 paragraph 3 --

21 THE COURT: Right, which means somebody told me.

22 MR. LEVINE: -- with additional materials regarding  
23 transcripts of one further trial.

24 Now, that sounds to me like somebody told me  
25 something. It's not that I found the transcript sitting in my

HCD7CONH

1 attic and I said, oh, gees, I can't believe I forgot this.

2 It's somebody came to me, said something to me, and I decided  
3 to put in another affidavit to this court.

4 Now, I don't know what happened. I have asked, as I  
5 said, for any information that would reflect anybody, and I  
6 have been told I am not entitled to that, for a witness that  
7 I'm not able to cross-examine.

8 But, you know, Judge, that's just the beginning with  
9 Mr. Curtler. Because, let me tell you something, when Mr.  
10 Curtler came into the Department of Justice -- after my client  
11 testified -- the first thing he was told in his first interview  
12 was something that I still frankly don't quite understand,  
13 given our wall. He was told by one of the members of the trial  
14 team that he shouldn't tell the trial team anything he's  
15 learned from the FCA, or thought that he got through open  
16 source reporting. And this going to be DX 51. This, by the  
17 way is also -- this is a 302. It is also attached to  
18 Mr. Weeks' testimony, but it's a 302 that has been disclosed.  
19 I don't think there is any problem with it. But if you can  
20 bring up DX1, and if you would please highlight the last part  
21 of the first paragraph.

22 THE COURT: Yes.

23 MR. LEVINE: OK. So this is now October of 2015. The  
24 DOJ, the FCA, all settled with Deutsche Bank. My client  
25 doesn't get indicted until '16. The Rabo issues are already

HCD7CONH

1 out there. And the instructions for Mr. Powers are, hey,  
2 buddy, just don't tell me; don't tell me what you know.

3 Now, if you're concerned -- because we already believe  
4 that there is material that has tainted him out there, and that  
5 they're litigating Rabo; they know there is a problem -- that's  
6 not what a prosecutor says usually. They say, gees, we better  
7 have a taint team interview this guy to make sure that we don't  
8 taint our case. Because, you know what, we've already got a  
9 problem with this issue.

10 According to affidavits submitted in the Rabo case but  
11 not this case, starting no later than 2011 or 2012, the FCA was  
12 given instructions by the Department of Justice on Kastigar --  
13 so, years into the problem -- you're telling the guy, hey, just  
14 don't tell me because, after all, it's magic; if you don't tell  
15 me, then somehow it didn't happen.

16 How does one do that? How does one divide one's mind  
17 between what you know from the FCA and what you know from other  
18 sources? It's a little bit like, Judge, charging somebody for  
19 being a derivatives trader who is told to trade derivatives and  
20 at the same time having that same person be a submitter for  
21 LIBOR where they're saying that if you come to work every day  
22 and trade your derivatives and submit LIBOR you're a criminal.  
23 Oh, that's what happened here, that's what they charged Mr.  
24 Curtler with. So, they want him to live up to a standard that  
25 they say Mr. Curtler's failing to live up to is criminal. But

HCD7CONH

1 that's a case for another day. That's their literal position  
2 here.

3 So, why did he tell him don't tell us? It gets worse.  
4 Because on their third proffer, which is DX54, second  
5 paragraph, they say, you know what, prior to the first meeting  
6 had with DOJ, and also prior to first communicating with his  
7 own attorneys, Curtler read press coverage related to the  
8 Deutsche Bank resolution with the United Kingdom's Financial  
9 Conduct Authority. He also read the settlement statement with  
10 Deutsche Bank. He never read any witness statements associated  
11 with the FCA's investigation. Nothing he read ever caused him  
12 to cooperate with the DOJ. Not the FCA notice. Not all of  
13 these trials. He just decided to do this out of the goodness  
14 of his heart.

15 What did they do then? Did they ask Mr. Curtler:  
16 What else did you read? We say the FCA notice is totally  
17 tainted, so it doesn't matter. What did you read? Let's get a  
18 taint team in here? Let's talk to this guy and find out what  
19 he knows and how he knows it? Did they do a line-by-line  
20 review to figure out what his information was?

21 They did nothing. In fact, they did so much nothing  
22 that they don't even tell you about that in Curtler's  
23 affidavit. You have a government cooperator, signed-up  
24 agreement which we just got, pled guilty. They submit an  
25 affidavit to this court not telling you about this. It's in my

HCD7CONH

1 brief. They don't tell you about this? They don't tell you  
2 about being direct taint? Who did he talk to in London after  
3 he got these transcripts? What information was he being  
4 provided? Who is the little birdie refreshing his  
5 recollection?

6 This isn't a joke; this is serious business. And the  
7 government just submitted to you another affidavit. They  
8 didn't tell but this, your Honor, or have Mr. Curtler say, you  
9 know, here is what I've done since 2013 to assure you that in  
10 all of my communications they're pure. Maybe he can say that;  
11 maybe he can't. But he hasn't. And that's why I say again, is  
12 this just lack of attention to detail? Or as you said on page  
13 24 of your opinion you've told people what they have to do:  
14 Did not review any charging document. Did not attend any  
15 trial. 3, did not discuss the testimony or anything derived  
16 from any person who has been identified as being exposed to it  
17 OK. Well, the FCA, this document -- and we're going to show  
18 you why I know this document is compelled testimony -- is  
19 exposed. They know that. They know it at the time.

20 THE COURT: This document being?

21 MR. LEVINE: The FCA notice, your Honor, the  
22 settlement.

23 THE COURT: Thank you.

24 MR. LEVINE: And we will mark that in a second.

25 So, your Honor, again now we have a cooperator. And,

HCD7CONH

1 look, Kastigar doesn't have a lot of law, but I do think,  
2 Judge, we have a lot of experience with how we use cooperating  
3 witnesses to establish facts. We do it in affidavits, search  
4 warrant affidavits, the government does it all the time.

5 And it is, of course the law in other contexts -- not  
6 this context -- that if you were going to use a person that has  
7 an agreement with the government, a person that has reason to  
8 curry favor, that you disclose that fact in a candid way in the  
9 affidavit, whether they be a cooperating witness or simply a  
10 source, bolster their credibility, and allow the court to at  
11 least have the benefit of knowing what is going on.

12 I don't believe in any of the exhibits that you're  
13 going to look at, Judge, for Mr. Weeks or anyone else that the  
14 government has informed this court -- who did not take Mr.  
15 Curtler's plea -- what his deal is.

16 Now, you might decide to credit his affidavit  
17 nonetheless -- and of course I'm not going to tell the court  
18 what to do other than to suggest what I think might be the  
19 might interpretation of the facts -- but I can sure say it  
20 troubles my client and it troubles me that Mr. Curtler -- who  
21 has enormous credibility problems in this case -- as they tell  
22 you, Mr. Curtler had a different story before he talked to the  
23 government, a different story before my client gave compelled  
24 testimony. And now that he has suddenly changed his tune, but  
25 not very much, the government in my view has simply, you know,

HCD7CONH

1 put the arm on him to say, yeah, everything we did was wrong,  
2 even though his evidence will show that he knew what he was  
3 doing wasn't wrong, because it was completely endorsed by  
4 everybody, that his actions were proper.

5 So, they're asking you to take his word for it --  
6 yeah, Judge, I didn't see anything, I only saw the Hayes trial.  
7 Oh, wait a second, I guess this supplemental affidavit also  
8 just came to be last night, I should be grateful, instead of  
9 Mr. Meaney who we got this morning.

10 I mean what is going on here? Even if the government  
11 contends to you, you know, we're still right about this, it  
12 doesn't give the court and should not give the court any  
13 confidence that we know what's going on here, because we don't.

14 What did this man look at? What indirect taint? You  
15 told them what to say. You literally wrote them an order and  
16 said if you say the following three things, and you do it  
17 reasonably credibly, you've got a good case to get rid of this  
18 problem. They didn't do it. Where is that in Mr. Curtler's  
19 affidavit?

20 So again -- and I happen to think that for a  
21 cooperating witness who has massive credibility issues I think  
22 caused by the government, but massive credibility issues  
23 nonetheless -- I think having a proper affidavit that is  
24 ascribed under the laws of this country would be a good thing.

25 Now, the government has said to you in a letter last

HCD7CONH

1 night that we should seal the courtroom because none of the  
2 trial witnesses here are infected. How do I know that? I  
3 don't have affidavits from the trial witnesses. I don't even  
4 know who they are some of them.

5 So, what are they talking about? What we have with  
6 Mr. Curtler is a situation that this court cannot find as a  
7 matter of fact or law what influences have been put on him.

8 THE COURT: Mr. Curtler is not going to testify at  
9 trial? I mean I thought he was one of the principal  
10 cooperators.

11 MR. LEVINE: He is. He is absolutely testifying at  
12 trial.

13 THE COURT: OK. He will have to be cross-examined in  
14 connection with this hearing. I mean he is a witness in this  
15 case.

16 MR. LEVINE: I understand.

17 THE COURT: He is not some official from the  
18 government of Great Britain.

19 MR. LEVINE: I agree, your Honor. My only point to  
20 you is when we start going through these affidavits -- now with  
21 Mr. King, we have a similar problem, and that's -- I think  
22 that's government 8, your Honor. We can put that up, if we  
23 could.

24 Yeah, so, you know, Mr. King doesn't tell us anything.  
25 He just said says, yeah, I didn't see it, I haven't looked at



HCD7CONH

1 any trials. He doesn't talk about who he has talked about. It  
2 doesn't say who he has discussed it with, it doesn't say what  
3 procedures have been applied. He just says, yeah, I don't know  
4 anything about that. He doesn't even tell you, he doesn't even  
5 disclose to you what happened with Mr. Prange when he was  
6 debriefed by him.

7 Now, maybe he doesn't remember and it's hard for a  
8 witness potentially to say how he was influenced. The  
9 government is skilled in doing that on their own. But I don't  
10 know, I don't see his affidavit tells you there is no taint.  
11 It doesn't comply with your order on its face.

12 And I will say, your Honor, one of the reasons I was  
13 so concerned, and I wrote you a letter about the government  
14 resting, is because I absolutely object to them being able to  
15 supplement these affidavits now, because I'm here, we're ready.  
16 I wanted to go with Prange today. I think it's very, very  
17 prejudicial for us to have to do this in January when the trial  
18 is in February, and it's not right after all this time that  
19 they now come and say, hey, we want to fix these affidavits.  
20 It's just not right. I have asked you for an order on that,  
21 but I wanted to point it out again now.

22 Also Mr. King doesn't tell you about the deal he has.  
23 We just got it. It's a nonpros. He wasn't charged. OK, fair  
24 enough. Where is that in this affidavit to give this court  
25 some comfort that you understand the basis for the statements

HCD7CONH

1 he is making and what his possible motives are? It's not in  
2 here either.

3 Again, they're not telling you the whole story. And  
4 regardless of what the story is -- and I think that story is a  
5 bad one -- candor, directness, is required in a Kastigar  
6 hearing.

7 You know, I thought a lot over the last months about  
8 why it is the courts always describe Kastigar as a heavy  
9 burden. It's a preponderance, that's the burden, which we  
10 don't usually think of, at least us criminal lawyers. And I  
11 think the reason it's heavy is not because of the quantum of  
12 evidence but because it is one of those instances where the  
13 very weight of our system is on the government to justify that  
14 something didn't happen that we believe very firmly in our  
15 bones as Americans cannot happen, which is the breach of the  
16 promise to be free from self-incrimination is truly an  
17 important promise that we have. And I think the reason courts  
18 call it a heavy burden is because if in fact there is even a  
19 chance that indirectly somebody's Fifth Amendment rights have  
20 been compromised through the government's forcing people to  
21 bend a knee and talk about themselves -- a concept which is  
22 inimical to our version of liberty -- the government has a  
23 heavy burden in the system to show in a serious and somber way  
24 it didn't happen, we're OK.

25 That's why it's heavy. It's not just heavy because of

HCD7CONH

1 who has to prove what. It's heavy because it's a somber and  
2 important responsibility. And I think so far I've showed you I  
3 don't see that that's been discharged. And I'm not casting  
4 aspersions. I'm just saying this is serious business, and I  
5 don't see here serious work to make this court comfortable.

6 THE COURT: OK. Sit down for a minute, Mr. Levine.  
7 Sit down for a minute and let me hear from the government on  
8 what has been said so far.

9 MS. SHAW: Yes, your Honor. First, we would agree  
10 with the court with respect to where Allen has brought us,  
11 which is not in a world where Kastigar taint is an airborne  
12 pathogen. There doesn't need to be a wall, as your Honor  
13 indicated. And we would submit that the filter system that is  
14 in place has been more than adequate.

15 The fact that we are in the same office building is  
16 not an adequate allegation to suggest that I go around reciting  
17 Mr. Black's compelled testimony for all to hear, or that I give  
18 access to my file cabinets to others. That's just not what is  
19 prescribed by Kastigar, and it's certainly not an allegation  
20 that I think has any evidentiary weight here.

21 I did want to correct for the record what Mr. Levine  
22 said about the FCA compelled testimony in UK law. While it is  
23 true that his compelled testimony under UK law from the FCA,  
24 they can't use it directly against him in court, it is not the  
25 same as immunity here where you can't use it indirectly.

HCD7CONH

1 THE COURT: I understood that that is what Mr. Levine  
2 was saying. He said they were not determinant. They are not  
3 determinant.

4 MS. SHAW: Very well, your Honor.

5 With respect to Mr. Meaney's declaration, we would  
6 submit that the first one is not inconsistent but it is  
7 incomplete and, you know, certainly it's an issue that goes to  
8 weight.

9 I would submit that certainly these are events that  
10 happened some time ago. I can't attest to how the FCA conducts  
11 their discovery files or records. And I think your Honor aptly  
12 pointed out they're not bound by the U.S. Attorney's manual.  
13 Our role as the filter team is to go and get answers. And I  
14 think the declaration will certainly show you that we attempted  
15 to get as much detail from Mr. Meaney and others as we could in  
16 terms of dates.

17 I think your Honor has also noted that --

18 THE COURT: I wish you had done that in August.

19 MS. SHAW: Regrettably that did not happen, your  
20 Honor.

21 THE COURT: Right.

22 MS. SHAW: In any event, all of the representations  
23 counsel makes really are an attempt to get into this larger  
24 argument that I understand he has raised with the trial team  
25 about this joint prosecution and trial team and how this is

HCD7CONH

1 all, you know, one big prosecution team. And it's my  
2 understanding from the trial team -- and certainly I will defer  
3 to your Honor -- that those two or the several attempts he has  
4 made to raise this have not been successful.

5 But we're here because of one issue, and that is  
6 whether there was any exposure to Mr. Black's compelled  
7 testimony to any trial witness, to any prosecution team member.

8 THE COURT: Grand jury witness.

9 MS. SHAW: Yes, grand jury witness. And we would  
10 submit that on the affidavits there has been no exposure. And  
11 Mr. Prange's testimony in January will further bear that out.

12 We would also submit that the FCA warning notice does  
13 not -- at least according to the -- and you will hear this from  
14 Mr. Prange and I believe from Mr. Meaney's declaration also --

15 THE COURT: Are we getting into that? Because I  
16 thought we were not getting into that. I thought Mr. Levine  
17 said paragraph 9 -- he could keep paragraph 9 off limits until  
18 we could have a sealed hearing.

19 MS. SHAW: That's fine.

20 THE COURT: That was the one thing that would remain  
21 sealed, paragraph 9.

22 MS. SHAW: Of the warning notice?

23 THE COURT: No, of Mr. Meaney's affidavit, which  
24 discusses things about the warning label. Right? Am I right?

25 MR. LEVINE: Yes, your Honor.

HCD7CONH

1 MS. SHAW: In any event, all of the things that  
2 counsel is emphasizing, this notion that these witnesses --  
3 which it was never our intention -- it's my understanding the  
4 court was well aware that there were cooperators in this case  
5 from the trial team.

6 THE COURT: Yes.

7 MS. SHAW: So, it was certainly not filter team's  
8 intention to not inform the court of that with those  
9 declarations. I thought that was well known. And certainly we  
10 had turned over the materials to defense.

11 THE COURT: I have never seen the cooperation  
12 agreements. As Mr. Levine knows -- because I'm kind of  
13 notorious for it in the building next door -- my motto is the  
14 judge is always the last to know, and I am not ordinarily given  
15 that information by the United States Attorney for this  
16 District until 3500 material arrives. And it hasn't arrived.

17 So, no, I don't know what their deals are; I didn't  
18 know that Mr. King was nollied. It is information that if I  
19 decide that he doesn't have to be cross examined -- and I feel  
20 rather differently about the cooperating witnesses than I do  
21 than other people who have given affidavits -- but if I decide  
22 that he were not have to be cross-examined, then I would  
23 certainly want to know that about him; I would want to know  
24 what his deal was. Correct, it's a pertinent piece of  
25 information.

HCD7CONH

1 MS. SHAW: And certainly --

2 THE COURT: Now I do, I know he has been nollied.

3 MR. LEVINE: Nonpros.

4 MS. SHAW: And certainly that information would come  
5 out at trial, and Mr. Levine would have an opportunity --

6 THE COURT: No, but you want me to accept his  
7 affidavit now at this hearing. This hearing is not the trial.  
8 This hearing is this extra hoop that I am required to make you  
9 jump through, and so it's got to come out here too. This is  
10 its own little mini trial.

11 MS. SHAW: Correct. And the affidavits that we put  
12 forward show -- indicate on their face that there was no  
13 exposure. The allegations that counsel makes -- again  
14 attempting to sort of create this cloud of misrepresentations  
15 as though the trial team made misrepresentations to the court  
16 about the interactions with the FCA -- is, as your Honor  
17 pointed out, a red herring. Nobody has said that nobody spoke  
18 to the FCA and they wouldn't take calls; that's not the case.

19 THE COURT: No, on the contrary, on the contrary, it's  
20 been quite clear that for the last six years the FCA and the  
21 United States Department of Justice have been working hand in  
22 glove, that's quite clear. That, as I read Allen, was not the  
23 reason that the Second Circuit concluded there had been a  
24 Kastigar violation. I think the Second Circuit was perfectly  
25 aware that there was extensive cooperation in the LIBOR

HCD7CONH

1 investigation between the FCA and the Justice Department. I  
2 don't recall that that was the reason or a reason assigned for  
3 finding that there was a Kastigar violation.

4 MS. SHAW: I agree, your Honor. And, you know, I  
5 would submit that the government is not in agreement with the  
6 Allen decision.

7 THE COURT: Well, I know you're not in agreement, but  
8 there is nothing I can do about that. I'm not sure where you  
9 are in the process of trying to get rid of it, but I know you'd  
10 like to get rid of it, but you aren't rid of it.

11 MS. SHAW: Correct, your Honor. I would note though,  
12 however, one thing -- one of the many questions that the Allen  
13 decision left open is the notion that Kastigar even applies in  
14 this instance.

15 THE COURT: Look, I understand that that's the  
16 government's position. I assume -- has the Circuit denied? I  
17 think the Circuit's denied. Have you filed a cert petition?

18 MS. SHAW: That matter is under consideration. We're  
19 considering all options.

20 THE COURT: Well, you can't be very serious about your  
21 argument if you didn't have a cert petition in the drawer ready  
22 to file on the day when the Second Circuit told you no. You  
23 can't be very serious about the argument.

24 MS. SHAW: I'm not at liberty to discuss deliberative  
25 processes within the Justice Department, but it's my



HCD7CONH

1 understanding we have 90 days.

2 THE COURT: Yes, that is the law, you have 90 days.  
3 The rule is that you have 90 days. When, by the way, will the  
4 90 days run?

5 MS. SHAW: Off the top of my head, I don't know the  
6 day that the en banc --

7 THE COURT: Does anyone know when the mandate came  
8 down from the Second Circuit? Because it's 90 days from the  
9 date of the issuance of the mandate.

10 MS. SHAW: I don't have the date of the mandate on the  
11 top of my head, your Honor.

12 THE COURT: Do you know, Mr. Levine?

13 Mr. Breen, do you happen to know?

14 MR. BREEN: I don't, your Honor.

15 THE COURT: OK, nobody cares but me.

16 MS. SHAW: So, your Honor, with respect to counsel's  
17 representations about the Meaney affidavit, again I --

18 THE COURT: Well, you have to admit that you say there  
19 is no inconsistency, that the first letter was incomplete. I  
20 would say were I to accept your representation -- which, by the  
21 way, I do not -- woefully incomplete might be an adequate way  
22 of describing the first letter. Woefully incomplete. I see an  
23 inconsistency.

24 MS. SHAW: Very well, your Honor. I would submit,  
25 however, one difference between the two and sort of the format,

HCD7CONH

1 is that Mr. Meaney drafted that first letter to us without --

2 THE COURT: Right, because you hadn't gone over there  
3 and done what the lawyers from the United States Department of  
4 Justice do, which is put your witness through his paces.

5 Guess what, I made an unwarranted assumption. I could  
6 not believe that the United States Department of Justice would  
7 be so careless as to submit to me a document -- not under oath  
8 but that was being proffered in lieu of a document under  
9 oath -- from somebody who was essentially its witness without  
10 talking to the witness, prompting the witness, asking questions  
11 of the witness, getting the witness's full story.

12 I think you and I would be in agreement that  
13 Mr. Meaney's letter of last August would have read rather  
14 differently if you had had with him in July the conversation  
15 that you obviously had with him in November. And I actually --  
16 based on my prior dealings over the last 19 years with the  
17 Department of Justice -- thought that you had. I thought you  
18 had.

19 There are two people sitting in this room who appeared  
20 before me as assistant United States attorneys, and it never  
21 would have occurred to them when they were in the office here  
22 to have submitted a document to me in any form without having  
23 heard the story of the individual who authored the document; it  
24 just never would have happened. I don't know, I never worked  
25 in the office, I never worked in the Department of Justice, but

HCD7CONH

1 as a result my experience is informed entirely by what goes on  
2 in the building next door and what they do in this building,  
3 and I tell you they are very careful about those things.

4 MS. SHAW: Well, your Honor --

5 THE COURT: Main Justice I have very few dealings  
6 with.

7 MS. SHAW: Your Honor, I would submit we're not  
8 representing that we did not speak with Mr. Meaney prior to  
9 that letter. And again, you know ---

10 THE COURT: Whoa, I don't think you want to make that  
11 representation to me.

12 MS. SHAW: No, I'm not representing -- we spoke to him  
13 and requested the letter, your Honor. Again, as of July -- and  
14 the date is not clear in my head as to when the Allen.

15 THE COURT: The letter came in August.

16 MS. SHAW: But certainly I believe the briefs were due  
17 on this issue in late August. We had been advised that the  
18 filter team needed to respond at a late date. They were  
19 traveling to London to put documents and interview the witness.

20 THE COURT: Put that on the trial team, I guess.

21 MS. SHAW: In any event, your Honor, if there are  
22 additional questions concerning.

23 THE COURT: No, anything you wanted to respond to that  
24 Mr. Levine said? Then he wants to talk again, because  
25 Mr. Levine always wants to talk again.

HCD7CONH

1 MS. SHAW: Understood, your Honor. That's all I have.

2 THE COURT: Your turn, Mr. Levine.

3 MR. LEVINE: Your Honor, I do note just one  
4 interesting little fact, and I agree with my friend from  
5 Washington that I believe she is correct that there is no  
6 derivative use in the UK. And, as the court pointed out, I  
7 wasn't suggesting so.

8 But that does raise an interesting question in my  
9 mind. As I understand it, the bar is the introduction of the  
10 testimony itself, not to its derivative use. So, why ever  
11 would the SFO need a taint team? There is no need for it if  
12 all you have to do is not present it to a court.

13 THE COURT: You know, I'm not going to second guess  
14 Her Majesty's government on why it decided to create a taint  
15 team in a circumstance when it is confronted with the need on  
16 the one hand to cooperate with American prosecutors and on the  
17 other hand to deal with its own business in England.

18 I can understand fully why Her Majesty's government  
19 might choose to create something that's not normal procedure  
20 for that government in order to deal with the peculiarities of  
21 our government which has them all the time.

22 MR. LEVINE: I quite agree, your Honor, and that's why  
23 --

24 THE COURT: Good.

25 MR. LEVINE: -- that's why it's surprising to me that

HCD7CONH

1 in Government Exhibit 33, the affidavit from the SFO itself,  
2 there is no mention of a taint team. The only mention of a  
3 taint team is in Mr. Meaney's affidavit. So, apparently the  
4 SFO did not think it important at least to reveal that, which  
5 is why I question. I don't know.

6 THE COURT: I got to tell you, I'm underwhelmed by  
7 that argument, Mr. Levine.

8 MR. LEVINE: Fair enough. Your Honor, I'm just trying  
9 to get the facts. Also, your Honor, for your edification, I  
10 believe that the mandate issued on November 9, and on February  
11 7 the 90 days will elapse.

12 THE COURT: Thank you.

13 MR. LEVINE: Well, your Honor, I didn't hear a word  
14 about indirect taint about Curtler or King. So, I suppose we  
15 can move on from there; the government doesn't intend to  
16 contest the fact that they have not established that there is  
17 an indirect taint, because it's not in the affidavits.

18 MS. SHAW: The government doesn't concede that at all.  
19 The affidavits on their face indicate there has been no  
20 exposure. And I don't believe anything that counsel has  
21 brought up changes that.

22 Again, it's a preponderance standard, and there is  
23 no -- he has pointed to nothing other than the fact that  
24 they're cooperators, which is always an argument one can make  
25 when somebody admits to a criminal offense. But I think that

HCD7CONH

1 just from a logical argument perspective --

2 THE COURT: Well, it's Mr. Levine's position that the  
3 affidavits if accepted as true rule out the possibility of  
4 direct taint. It is his further position that they do not rule  
5 out the possibility of indirect taint as, for example, by  
6 conversations with people who were exposed. That's his  
7 position. The government's position is?

8 MS. SHAW: That there is no one that he has been in  
9 contact with with respect to the government or the government  
10 trial team or former ones who would have passed that on; that  
11 Mr. Prange -- who will be here -- and I won't put words in his  
12 mouth -- was, as the FCA was, was told not to put compelled  
13 testimony of anyone to their witnesses. And they did so out of  
14 this concern that we had about compelled testimony.

15 So, what counsel has is speculation, but, you know,  
16 these transcripts are confidential, they are not to be passed  
17 around London. This wasn't something that was --

18 THE COURT: I think that's the best part of the  
19 government's argument, that it violates UK law to make these  
20 transcripts available or to discuss them.

21 MS. SHAW: Correct, your Honor. So, you know, other  
22 than mere rank speculation that that happened, I don't believe  
23 that Mr. Levine -- that counsel has a basis for attacking the  
24 affidavit that's before this court. Certainly he will be able  
25 to cross-examine Mr. Curtler on the stand at trial and do

HCD7CONH

1 whatever he wants to do with the fact that he is cooperating  
2 with the government.

3 But for purposes of Kastigar I do want to point out --  
4 and I won't get into the substance of Mr. Black's compelled  
5 testimony -- but your Honor has read it, and I think it would  
6 be -- it's not the case where it's the kind of thing that  
7 would, as Mr. Levine said, force someone to change their tune.  
8 If anything, it defies that notion, because your Honor has seen  
9 it -- and I will leave it at that -- we have characterized it  
10 in our briefs, and your Honor has also seen it, but this is  
11 hardly the thing where, you know, because of reading that, even  
12 if he was exposed -- which we're saying he was not indirectly  
13 or directly -- it's not the kind of thing one would logically  
14 change your tune after reading; in fact, one might proceed very  
15 differently.

16 So, with that, your Honor, that would be my point with  
17 respect to the two cooperators that Mr. Levine just mentioned.

18 MR. LEVINE: Your Honor, there is not a word in their  
19 affidavit complying with the court's order on page 24 that a  
20 representation that the person did not discuss the testimony or  
21 anything derived therefrom from any person who has been  
22 identified as having been exposed to it.

23 There is just no representation there whatsoever. And  
24 they talk to Mr. Curtler. They did ask him. And he said, you  
25 know what, I read a bunch of stuff, including the FCA notice

HCD7CONH

1 and other things. They didn't even ask him. We have the 302s.  
2 They didn't ask him what else have you been exposed to. And  
3 they come to you now and say -- Judge, what Ms. Shaw said,  
4 nobody on the trial team talked to him? That's all terrific  
5 statements. They're not in the trial team's affidavits.  
6 They're not in Mr. Curtler's affidavits. They're not in any  
7 submission that's been made to you. She has just said it.

8 The whole purpose of this hearing is this is their  
9 witness, this is their evidence, it's not here. So what might  
10 be here, I don't know. I can't guess what might be here. I  
11 know that Mr. Curtler can't be consistent even on what he has.  
12 And the Department of Justice twice asked him about this and  
13 purposefully it seems didn't get the full answer.

14 So, when Ms. Shaw says there is nothing to see here,  
15 if she can point to me where in this affidavit she explains  
16 what he said in his 302, or explains his change of testimony  
17 from last night, then fair enough; but if she can't, then the  
18 government should just concede the point and we should move on,  
19 because the words on the page are the words on the page. So,  
20 if there is something I'm missing, I'm happy to be corrected.

21 MS. SHAW: Your Honor, counsel moved from the  
22 cooperator back to Meaney, so with respect --

23 THE COURT: No, he's still talking about -- because  
24 he's talking about Curtler and the supplemental declaration and  
25 the, oh, oops, I read the transcript of the brokers trial too.



HCD7CONH

1 MS. SHAW: Yes, your Honor. Certainly, as I mentioned  
2 before, you know, folks remember things over time. I do  
3 have --

4 THE COURT: Well, let's be fair. This is worded in a  
5 way that says somebody told me that I read the brokers  
6 transcript; I have had my recollection refreshed. Not I woke  
7 up yesterday morning and I remembered that I had read it. But  
8 I've had my recollection -- or somebody told me that I  
9 requested copies of the transcripts in the brokers trial and I  
10 got them; I don't recall reviewing them.

11 Well, I don't think he didn't review them. I don't  
12 think he got them and put them in the closet unread. I don't  
13 believe that. All right?

14 I don't recall becoming aware of any reference of the  
15 compelled testimony of Gavin Black.

16 Now, we didn't specifically address -- our British  
17 friend did not in any of their affidavits particular trials, as  
18 I recall. I think what they said was a general statement that  
19 his testimony was not referenced or read from at any trial that  
20 took place in the UK. I think that's what somebody said.

21 MS. SHAW: That is what the original letter had said,  
22 and I believe it said "to the best of my knowledge," and then  
23 your Honor requested that either the SFO attest --

24 THE COURT: And somebody is looking at transcripts.

25 MS. SHAW: Yes, a colleague of ours has done extensive

HCD7CONH

1 computer searches and reviewed -- there are about over 22,000  
2 pages of transcripts from the three trials, and spent I think  
3 77 hours going through them with a computer, and has found no  
4 references whatsoever to the compelled testimony or anything  
5 that appears to be derived from it.

6 THE COURT: Wait. Once upon a time I actually  
7 litigated cases, and that certainly would have been in my  
8 affidavit. That would have been Exhibit 37. And Exhibit 35,  
9 if I had been representing the government, would be the  
10 affidavit from that person to tell me that he/she had spent 77  
11 hours reviewing every page and all the computer references of  
12 the three trials that were held in London, and could not find a  
13 single reference to the compelled testimony of Gavin Black.  
14 But there is no such evidence in the record, as Mr. Levine  
15 points out.

16 MS. SHAW: There is. Exhibit 35 is the declaration  
17 that attests to all of those specifics.

18 THE COURT: Which one is that?

19 MS. SHAW: Laura Connolly?

20 THE COURT: Oh, I haven't seen it. I haven't seen it.  
21 It's not one of the ones I read yesterday. Thank you. We'll  
22 get it.

23 So, Mr. Levine, if we were to proceed as you would  
24 wish to proceed, what would you propose?

25 MR. LEVINE: Your Honor, I think there are just one or

HCD7CONH

1 two more things I would show you today, because I think it  
2 would orient the court to some of my arguments, and then I  
3 think after that we need to have a conversation with you about  
4 the structure of the hearing to come.

5 I think that one of the things that we just heard from  
6 the government is, oh, I'm just raising issues that have been  
7 previously litigated. Well, that is in part true. I'm going  
8 to raise an issue that says you have a bunch of affidavits from  
9 a bunch of Department of Justice lawyers who I think when they  
10 sign a declaration take it seriously, and they're asking you to  
11 believe them, and my general believe is in most cases you  
12 should believe them. But this isn't most cases.

13 Representation have been made to you, your Honor, and  
14 I would like to pull one of them up. Just put the government's  
15 brief up. The government told you in very aggressive response  
16 to my motion for joint prosecution treatment these folks are  
17 not on the same team together, and I'm going to give you some  
18 examples.

19 I am making this argument, Judge, no to reargue my  
20 joint prosecution motion -- ly ask for that later. I will make  
21 it to attack the credibility of the affidavits before you. I  
22 would like to read this with you:

23 "The defendants also assume, based on the similarity  
24 of various settlement paperwork with Deutsche Bank, that the  
25 independent agencies that settled with Deutsche Bank must have

HCD7CONH

1 jointly investigated and then aligned their view of the facts  
2 and allegations. But these similarities have a simple  
3 explanation: The facts are the facts. DOJ and these agencies  
4 did not share paperwork or have input into what resolutions  
5 each agency should have (fine amount, violations) and while the  
6 various agencies at the request of Deutsche Bank coordinated on  
7 the timing of the resolutions to the extent possible, the  
8 settlement timing cannot, and this Circuit's precedent, and  
9 does not support a finding that this was a joint  
10 investigation."

11 So, I'm wrong, they're right. The fact that every  
12 settlement comes out on the same day in every single one of  
13 these LIBOR prosecutions, and they thank each other profusely  
14 for all their help, that's diplomatic mumbo jumbo, and we're  
15 all Americans.

16 Now let's look at the e-mail which was sent. Let's  
17 see what the Department said. Let's start with the e-mail from  
18 Ms. Saulino on the bottom. She was one of the lead members of  
19 this prosecution before she departed to private practice. And,  
20 Judge, I'm offering this because she has put in an affidavit as  
21 well as the rest of the prosecution team.

22 THE COURT: I saw it.

23 MR. LEVINE: "I understand that you have shared the  
24 FCA's notice with Anthony Albanese at DFS. For reasons you and  
25 I have discussed, I don't want to see your notice. For similar

HCD7CONH

1 reasons, however, would you be able to identify directly to  
2 Anthony the paragraph and portions of the P3 and P5 notice that  
3 you sent him that involve information that was learned from  
4 compelled individuals. If you have any questions about this  
5 request, I can make myself available at any time tomorrow  
6 morning."

7 OK. Now let's see the response from Mr. Meaney.  
8 First sentence: "We consented to DB sharing a redacted version  
9 of our draft warning notice with DFS."

10 But let's concentrate on the next paragraph:

11 "I am not sure we can do what you request regarding  
12 our warning notice. The reality is even though we don't quote  
13 any compelled testimony in the notice, it has influenced almost  
14 every aspect of the P3 and P5 findings so it would be very  
15 difficult to identify a part that weren't influenced by the  
16 compelled testimony. Even if we could, it would be such a  
17 small part that it would make the notice meaningless."

18 Now, the warning notice, your Honor, in England, is a  
19 notice that comes with the final notice -- and I will represent  
20 to the court it's my understanding that in this case they are  
21 for these purposes identical or virtually identical.

22 P3 and P5 refer in the FCA -- they have principles of  
23 the FCA, and 3 and 5 basically all relate to the conduct at  
24 issue here. There is another part of the settlement which  
25 relates to 11 principles which are obstruction-like principles.

HCD7CONH

1 I will show you another e-mail that the Brits were coming to  
2 America to talk to Americans about those findings.

3 So, you just heard from them again that I'm just  
4 making all of this up. They represented to you no paperwork  
5 was shared? Really? They sent the DFS -- the agency that they  
6 told you has nothing to do with this -- and it was sent by  
7 Deutsche's lawyers, which is a whole other level of taint. But  
8 let's go to the next paragraph, because that's going to get  
9 into this even more.

10 "I have reviewed the draft statement of facts to go  
11 with your order and confirm that it is very consistent with the  
12 findings in our notice, except your time period for U.S. dollar  
13 goes back to 2003 and our goes back to 2005, and you make  
14 reference to Euribor submitters and we do not."

15 I will represent to the court that the statement of  
16 facts, I believe, are the statement of facts attached to the  
17 Deutsche Bank settlements which was entered two days later when  
18 they all came out.

19 Now, they made a specific representation to you, your  
20 Honor, no paperwork was shared. This is the last of the  
21 e-mails, but it's not the first in terms of timing. That  
22 representation is false.

23 THE COURT: I assume this is referring to the Deutsche  
24 Bank settlement order?

25 MR. LEVINE: Yes, two days later.

HCD7CONH

1 THE COURT: The order that was signed in connection  
2 with the Deutsche Bank -- it was the proposed order that ended  
3 up being signed.

4 MR. LEVINE: Yes, in Connecticut, and I can show it to  
5 you.

6 And clearly if you compare, you know, they've said as  
7 they say in their brief -- there's no surprise -- they said,  
8 well, the facts are the facts.

9 Well, two things, Judge. Let's just think about the  
10 wall here. Ms. Saulino -- and I will show you -- let's pull up  
11 the e-mail -- Ms. Saulino wants to find out whether they're all  
12 on the same page. Which is exactly what they said they didn't  
13 do. So, she sends the statement of facts to Meaney and Co. to  
14 review it. But think about what that means. That means  
15 Ms. Saulino is asking the United Kingdom to look at her  
16 documents and say we don't have anything that's different than  
17 yours.

18 Now, you know there is a great scene in the movie All  
19 The President's Men with the Bob Woodward character, I believe,  
20 is asking a question of the source who can't give him the  
21 information, and he sort of says just don't respond to me if  
22 I'm right. Everyone knows that that's just a little game, that  
23 the source is actually responding; he's confirming it, but he's  
24 doing it in a way that gets to the point without necessarily  
25 saying it.

HCD7CONH

1           So Ms. Saulino got the FCA to confirm their entire  
2 investigation and shape what the Department of Justice thought  
3 in some ways based on confirming this.

4           Now, it would be one thing if the government had been  
5 candid with you and said, hey, Judge, yes, we worked together,  
6 yes, we strategized together -- and we will show you some of  
7 that -- yes, we had lots and lots of interactions, but we still  
8 don't think that you have told that Brady applies and we're not  
9 on the same time.

10           But it's quite another when I've had to file multiple  
11 briefs saying to you, Judge, these press releases really say  
12 these guys worked together. And they don't tell you about this  
13 e-mail. They don't tell you that they knew -- and they know  
14 today, and they knew before they filed all of this stuff --  
15 that the FCA absolutely believes that there's compelled  
16 testimony in the notice, that the FCA absolutely believes that  
17 they can't differentiate what's what. And if they can't  
18 differentiate what's what, and they admit Mr. Meaney under your  
19 Post-it that Mr. Black's testimony is identical to some of it,  
20 then how can they say it's not in there? They can't.

21           So I think this e-mail, and this one from  
22 Ms. Saulino -- which basically says as we discussed, we're  
23 attaching our drafting statement of facts. What's the subject  
24 line? DP draft statement of facts, April 15.

25           So where does the representation come from that says



HCD7CONH

1 we didn't share any paperwork? It's a straight-up  
2 misstatement.

3 And Mr. Meaney -- and who else is on this team? Well,  
4 Mr. Powers and Ms. Anderson, the other members of the trial  
5 team. All three of these people put in affidavits; they don't  
6 know anything about compelled testimony. They don't mention  
7 anything about any conversations they may have had. This  
8 e-mail I got from the government, Judge. Why am I showing it  
9 to you first?

10 So, I respectfully suggest the government should  
11 withdraw its comments suggesting that I'm trying to make up  
12 something about the nature of the relationship between these  
13 parties, and I think that the representation that says they  
14 didn't share paperwork is one that maybe that's another  
15 supplemental document that has to be filed to make a  
16 correction.

17 Now, let's go on. Now, your Honor, you have also  
18 heard that although they are in the same building there is no  
19 issues with respect to the taint team and the prosecution team,  
20 because obviously they would never talk about this stuff  
21 together. Let pull up this redacted e-mail I got.

22 This is from Mr. Jackson -- and I don't make any claim  
23 that he is doing anything purposefully inappropriate  
24 whatsoever. He seems like a total gentleman to me from my  
25 experience with him so far.

HCD7CONH

1           This e-mail with Mr. Jackson, Ms. Sipperly and  
2           Ms. Anderson, the members of the trial team. And what Mr.  
3           Jackson is reporting is that he just finished reviewing the  
4           compelled testimony in the notice, and he is sharing his  
5           thoughts on the relationship between those things.

6           And it's interesting, he says, yeah, there is a lot of  
7           stuff in here that's very similar to what Mr. Black says, but  
8           all he can't say, I don't know for sure that it wasn't derived.  
9           Yeah, this stuff's in there, all these topics -- not just  
10          something about eating charts -- it's all in there, but I don't  
11          know because, after all, I have no access.

12          So, tell me, Judge, my question to the government is  
13          which chink in the wall is this?

14          THE COURT: Mr. Jackson, good morning.

15          MR. JACKSON: Good morning, your Honor. Just to  
16          address this particular e-mail that Mr. Levine has put in front  
17          of your Honor, this was very, very early on when the taint --

18          THE COURT: July 2017?

19          MR. JACKSON: Yes, very early on for the purposes of  
20          the taint team in this case. And this was for the purpose of a  
21          hearing that I believe was to take place either -- even though  
22          the e-mail was sent very very early that morning -- I think the  
23          hearing was to take place later that day or perhaps the  
24          following day before this court. And the purpose was somebody  
25          on the taint team had to look at the compelled testimony of

HCD7CONH

1 Mr. Black and compare it to the final notice to see what there  
2 might be in the final notice that could perhaps have come from  
3 the compelled testimony.

4 So, I did that, and then I communicated those findings  
5 to the trial team. And I certainly attempted to be, you know,  
6 circumspect in what I conveyed, without getting into too much  
7 detail or particulars because of the issue of taint.

8 Subsequent to this, after talking to individuals at  
9 the FCA, we were able to determine through them that there was  
10 nothing in the compelled testimony of Mr. Black that made its  
11 way into the final notice.

12 The FCA did inform us -- as the e-mail from Mr. Meaney  
13 demonstrated, that defense counsel put in front of your  
14 Honor -- that compelled testimony was certainly used in the  
15 FCA's construction of the final notice, but it was not  
16 Mr. Black's compelled testimony. That testimony they found --  
17 you know, your Honor has looked at it, and I won't try to get  
18 into any specific characterization, but --

19 THE COURT: Please don't.

20 MR. JACKSON: But they were able to confirm for us  
21 that they did not use Mr. Black's compelled testimony.

22 So, those e-mails, I can't stand here and make  
23 representations about lines from the trial team's brief about  
24 paperwork, but, you know, from our perspective these e-mails  
25 don't really have anything to do with the Kastigar issue

HCD7CONH

1 because they don't demonstrate any exposure. Quite the  
2 opposite, Ms. Saulino, as you will note in her e-mail, said in  
3 fact please don't tell me anything because I don't know what  
4 might be in there, so I don't want to be tainted.

5 And we would leave it that with that, unless your  
6 Honor has more questions about this particular e-mail.

7 THE COURT: No, I was just wondering what you had to  
8 say about it.

9 Mr. Levine?

10 MR. LEVINE: I mean, look, that's all well and good.  
11 Can you show the rest of the e-mail.

12 What's all the redactions? What else happened here?  
13 This is the problem, Judge. You know, Mr. Jackson -- and he  
14 has a difficult job here today, and I respect him for doing  
15 it -- but he looked at this thing and said, yeah, these things  
16 basically match. And we will show you, Judge, they do. And  
17 what we have from the FCA is some completely conclusory, well,  
18 yes, there is a bunch of people's testimony, and we blocked  
19 Black from our mind; we can just use the others.

20 Well, wait a second, that's a line-by-line inquiry  
21 where they need to show you exactly what they used and how they  
22 used it. And, by the way, Meaney has already told you he can't  
23 do that, because in the quiet, when he is talking directly with  
24 the Department of Justice, and Ms. Saulino says, please, tell  
25 DFS what is the compelled stuff so I can stay away from it, his

HCD7CONH

1 unvarnished reaction is we can't do that; it's all mixed up,  
2 which means I'm in it.

3 And that's another little point. They're sending it  
4 to DFS? Compelled testimony to another agency? Which we have  
5 contended at least has to be looked at for Brady? And they  
6 told us how ridiculous we were?

7 Where is the communications between DFS and Department  
8 of Justice after this? Where is that in any affidavit here?  
9 You've got, you know, members of this trial team who know about  
10 it. Where is the information on what DFS got and how was it  
11 derived? Where is the information on what was passed to other  
12 people about this?

13 I mean it's one thing if the government came in here,  
14 Judge, and said, look, give me all the contacts between grand  
15 jury, indictment and then we will deal with trial, tell me what  
16 happened, be open about it, the Allen standard is the Allen  
17 standard. But they don't do that. They come in and say, oh,  
18 this is all just ridiculous, it's all nothing. And I will say  
19 something else about that: Why is this redacted?

20 But it gets sort of worse -- and this is the last  
21 thing I want to show you. The one other thing that we got --  
22 the one other thing we got are some notes of discussions. This  
23 is on the end of 14, and what this is a discussion about, your  
24 Honor, it's a call -- the exhibit number is Defense 90 --  
25 Mr. Prange, Mr. Meaney, Mr. Stevens -- I don't know who Stevens

HCD7CONH

1 is; he's an FCA guy -- Mr. King, Mr. Hasan. The court will  
2 recall no doubt that Mr. Prange, King and Hasan were in  
3 Mr. Black's testimony. The government represented it showed in  
4 that brief there was no strategic work between these agencies.  
5 We didn't do that. They sort of did their thing; we did ours.  
6 It's not true. But I just want to show you this, because it  
7 shows you how closely they were coordinating.

8 This is an e-mail frankly criticizing a very fine  
9 lawyer -- and a former Southern District assistant United  
10 States attorney -- because they didn't like the way that he  
11 conducted an interview which the government and the FCA both  
12 put him up to. And here is a particular quote. In light of  
13 the fact that they never coordinated with each other there is  
14 an FCA statement: "Are you allowed speak with him?" Talking  
15 about Finzi. "The interview was so bad and they said it was  
16 Paul Weiss's fault. The document was a call in August which  
17 was a key document in the entirety of Brown/Labrum where Brown  
18 says moved it down a tick and Labrum talks about his own  
19 submission. So that call combines two strands of Brown putting  
20 in stuff from Maine and Labrum putting in stuff for himself."

21 So I thought they didn't coordinate with strategy.

22 THE COURT: Well, I would say -- well, let us put to  
23 one side what they think about the job that Mr. Finzi -- who by  
24 the way was not at the firm when I was at the firm, as  
25 everybody knows.

HCD7CONH

1 MR. LEVINE: I know that.

2 THE COURT: But I think it would be the next paragraph  
3 that would perhaps --

4 MR. LEVINE: Your Honor, this is one example of  
5 something I want to show you on the next page. I can do this  
6 for a long time and show you a bunch of these, but let me show  
7 you what happens here.

8 Because Ms. Saulino then says -- and this is an  
9 issue -- this raises other issues about the nature of this  
10 internal investigation, since the government wants to put it in  
11 against my client. But look at the top of the page. "I got  
12 the lawyer's word" -- and I'm substituting "lawyer" for his  
13 name -- "that he will approach the interview as if he were a  
14 prosecutor, but I agree this is imperfect and I'm completely  
15 open to another solution."

16 The FCA -- let's see what the FCA says, the people who  
17 are not cooperating, as you have been told by all those  
18 prosecution team members -- "We appreciate your Machiavellian  
19 approach with asking Paul Weiss to conduct the interview. We  
20 would like to go in on certain dates."

21 THE COURT: I can tell you, Mr. Levine, you have  
22 wandered so far away from Kastigar and so far back into your  
23 once and future motion on the joint prosecution issue, that I  
24 just -- I'm not.

25 MR. LEVINE: May I just make a proffer to the court?

HCD7CONH

1 THE COURT: What you're saying is I should disbelieve  
2 the Justice Department people because you can establish to my  
3 satisfaction that they were in fact conducting what would be a  
4 joint prosecution for Brady purposes.

5 MR. LEVINE: I'm actually -- while I think that's  
6 true, I have a slightly different variation on that.

7 What I'm saying to you, Judge, is this hearing, we are  
8 here to determine the nature of the relationship between the  
9 FCA and the Department of Justice and other entities. And you  
10 have been told that that relationship was one in which there  
11 were limits, and you're told there is one in which there was a  
12 wall that prevented taint.

13 And I am suggesting to you that I have now shown you  
14 and can continue to show you that that is not the relationship  
15 that existed, that when we have affidavits from all of those  
16 Justice Department people that make no mention of the dozens if  
17 not hundreds of calls, e-mails and meetings they had, to allow  
18 this court to assess whether in any of those calls, in any of  
19 those meetings, and in any of those other circumstances, things  
20 were indirectly communicated because they're talking about the  
21 case -- and I will show you e-mails where they're talking about  
22 Mr. Black's case -- it raises the question as to whether the  
23 government has met its burden.

24 I am not rearguing that motion, but the only way I can  
25 show you, Judge, that these affidavits do not necessarily have



HCD7CONH

1 a basis in fact is to show you that the background assumption  
2 that the court has -- which is these people were not  
3 interacting on a daily basis -- is not true.

4 THE COURT: What makes you think that that's my  
5 background assumption? That's not my background assumption.

6 MR. LEVINE: Well, I took it --

7 THE COURT: I mean I have to tell you joint  
8 prosecution and interacting on a daily, weekly and monthly  
9 basis are not the same thing. So do me a favor, Mr. Levine,  
10 and don't make assumptions about what my background assumptions  
11 are.

12 MR. LEVINE: Fair enough.

13 THE COURT: My background assumption is that there was  
14 in fact cooperation between the British and the American  
15 officials on the LIBOR investigation. That's my assumption,  
16 which does not create a joint prosecution and does not  
17 necessarily mean that everything in the Brits' files is Brady  
18 material.

19 MR. LEVINE: I think what it does show though is that  
20 when you are told that certain things didn't happen that did  
21 happen, it calls into question whether you can accept an  
22 affidavit on the same related subject. That's all I'm saying.

23 I'm not presuming to tell the court what to think  
24 about that motion. I'm not rearguing the motion. But when  
25 somebody tells you we didn't share paperwork with the Brits, we

HCD7CONH

1 didn't strategize with them, and then they're telling you and  
2 we didn't get any compelled testimony, if the two propositions  
3 are false, then it tends to cast doubt on the next proposition;  
4 or at least raises the issue, as you said in your opinion,  
5 Mr. Prange has to come because I need to know what his contacts  
6 were with the Department of Justice from the time of the  
7 compelled testimony at least to the grand jury.

8 And I am now showing you that Mr. Meaney and Mr. King  
9 and all of these other folks were having very frequent contacts  
10 and the same thing applies. Because what you've said is that  
11 Mr. Prange has to come because he sat with their first  
12 cooperator -- and their first cooperator didn't have a one  
13 day/two day testimony -- and he changed his story a bit from  
14 what he said internally, the investigation.

15 So, the question is how that got shaped. And it's  
16 their burden -- not mine -- to show you that it couldn't have  
17 happened. And they have told you in these affidavits a whole  
18 bunch of nothing. They said we didn't see the thing. There is  
19 nothing in these affidavits that discloses to you these  
20 communications. They don't say, as the court has just said,  
21 look, we had frequent conversations with the FCA; we talked  
22 about them all the time. Ms. Saulino and Ms. Anderson are  
23 saying I went to England a whole bunch of times. They didn't  
24 tell you, for example, that there was a special meeting  
25 arranged where a dozen or so DOJ folks from the fraud section,

HCD7CONH

1 the SFO and a whole bunch of people from the FCA -- I don't  
2 know who they are -- had a two day meeting to talk about  
3 coordination.

4 I can't tell you what happened there. Maybe nothing  
5 happened there. But the question is not that. The question is  
6 they have to prove to you that nothing happened there, because  
7 Mr. Prange's standard applies.

8 And what I'm attempting to demonstrate to you, Judge,  
9 is that the notion, the only Kastigar issue here, the door that  
10 has to be closed, is the Mr. Prange door -- which I believe the  
11 court fairly inferred from the briefs that were filed before  
12 you about the nature of the relationship, so you didn't think  
13 there were any other doors to worry about -- is just not true.

14 So, I'm not rearguing the motion, but I'm entitled to  
15 say to you they have to close every door to get to trial in  
16 this case. They have to show you with their heavy burden that  
17 it didn't happen. And if you didn't know in your opinion in  
18 the Brady section -- and I mentioned this to you when we were  
19 in court the other day -- you say I have no information to say  
20 that the Department of Justice ever went to London to talk to  
21 anybody.

22 THE COURT: True, the first time I learned about it is  
23 when you mentioned it in court.

24 MR. LEVINE: Exactly right. Now, Mr. Black's proffer  
25 occurred in London. These folks -- and we have e-mails. If

HCD7CONH

1 you want to see e-mails about what hotels they're staying it,  
2 and who they're going to meet with, and who they're going to  
3 have drinks with from the FCA, I'll put them on.

4 You know, we heard before how the Department of  
5 Justice couldn't go over to London. The Department of Justice  
6 on this case has been over in London, and most of the proffers  
7 occurred over in London, they were there on a daily basis.  
8 They had meetings all the time.

9 The number of contacts -- frankly, we started to  
10 count -- because we got a lot of these documents very  
11 recently -- we can't even come up with a count. And that's  
12 only FCA. What about SFO? They also talk about how much they  
13 talked to some of the trial team members.

14 The question here is not what the result is in some  
15 other part of the case. The question is how are you going to  
16 determine without them telling you that there are all these  
17 contacts that nothing happened?

18 And we believe that something did happen, because we  
19 can read the FCA notice, and can I read Mr. Black's testimony.  
20 And there is no way that what he said didn't get in there. And  
21 Curtler, he submits he read it. So, he's tainted, this  
22 indictment is tainted, and he can't testify at trial. And  
23 Mr. King we believe was subject to Mr. Prange's investigation,  
24 and we will show you here other witnesses that they talked  
25 about how Prange was going to talk to him, Ms. Saulino giving

HCD7CONH

1 advice to Mr. Prange about what kind of questions to ask.

2 That shows there is no wall, and it shows that unless  
3 they prove that every single interaction is clean, Mr. Black  
4 should be able to go home.

5 So, I respect the fact that you have heard from me  
6 more than enough on everything but especially on the joint  
7 prosecution team but, come on, in fairness why haven't you  
8 heard about this from them?

9 And these affidavits, look at all of them. The only  
10 ones that said anything about the interaction with the FCA is  
11 Ms. Anderson and Ms. Saulino say, yeah, when we talked to the  
12 FCA we told them not to tell us stuff. OK. What about these  
13 meetings? What about these calls?

14 Now, a lot of these calls they blacked everything out,  
15 so I don't know what happened.

16 So, my basic point to you, Judge, is when we take  
17 every one of these affidavits right now, and none of these  
18 people told you what their interactions were with these other  
19 regulators -- oh, and by the way, there is another one, which  
20 we will put up in which there is a worry, because Bafin, the  
21 German agency, they were getting compelled testimony from the  
22 FCA too. And the government was worried that Paul Weiss was  
23 getting it. And so they wanted to ask the FCA for permission  
24 to let them talk to Paul Weiss, because they were worried that  
25 the lawyers in Germany and in England were getting stuff back

HCD7CONH

1 and there was going to be taint. I don't think you heard any  
2 affidavits about that. You don't have any affidavits  
3 addressing the issue about what is the communication between  
4 all of these lawyers. Although we do know from Mr. Meaney from  
5 this morning that he had some communicates with Slaughters and  
6 May and at least for some period of time he actually believed  
7 they had compelled testimony from Mr. Black. It turns out  
8 maybe they didn't. But where is that explained?

9 So here is this e-mail which is Defense 63.

10 "Steven, as part of our efforts to ensure that no  
11 information from compelled interviews is passed through others  
12 to us, we are wondering whether you would allow us to discuss  
13 with Paul Weiss the fact that you have provided some compelled  
14 interview transcripts to Bafin. We defer to you entirely on  
15 this. One reason we are asking that is so that we can impress  
16 upon them that should they receive such a request from Bafin,  
17 or reports that might contain information derived from those  
18 transcripts, we will want to make sure those materials are  
19 produced to a taint team rather than to our investigative team,  
20 and, further, that Paul Weiss attorneys don't report to us on  
21 our weekly calls about such things. Best Jennifer."

22 What is this about? What did Bafin get? I don't  
23 know. And the government, again, where is the wall? So Paul  
24 Weiss, which side are they on the wall? How about Slaughter?  
25 How about Bafin?

HCD7CONH

1           And, by the way, in all of these conversations, we  
2 haven't talked about the CFTC yet. CFTC is in on all these  
3 conversations as well. And I will direct your attention that  
4 Mr. Braun who gave you an affidavit -- but he filed a different  
5 affidavit in Rabo -- and in Rabo what he told Judge Rakoff was,  
6 hey, I've been telling those CFTC guys to stop going to  
7 compelled testimony.

8           So, we have got the CFTC who is on both sides of the  
9 wall, Judge, at least in the early period. I don't know how  
10 the CFTC behaved here, because even though -- I raised this in  
11 oral argument. I raised this in my briefs.

12           THE COURT: You raised it the first day I ever saw  
13 you.

14           MR. LEVINE: And nonetheless do you have an affidavit  
15 from the CFTC? And in fact the CFTC started this whole LIBOR  
16 investigation by contacting the FCA. That's how it started in  
17 2009 or '10. So what have you been told about the  
18 relationship?

19           THE COURT: Well, Mr. Black hadn't given any compelled  
20 testimony in 2009 or '10.

21           MR. LEVINE: Quite right. But the point is the  
22 interactions with the CFTC and FCA and DOA jointly went on for  
23 a while.

24           Here is Mr. Braun's affidavit, which is Defense 38,  
25 and let's see what he says. Number 7: "I communicated

HCD7CONH

1 regularly with attorneys at the CFTC's Division of Enforcement  
2 during the LIBOR investigation. On various occasions I advised  
3 the CFTC representative of the potential legal ramifications of  
4 their participation in or exposure to testimony obtained by  
5 compelled interviews." Then he talks about this. And he is  
6 advised -- if you go down a little bit -- "I was advised that  
7 the CFTC attorney attended compelled interviews conducted in  
8 London and Singapore during the summer of 2012, and those  
9 interviews related to conduct that occurred at financial  
10 institutions other than Rabo and interdealer brokerage firms."

11 THE COURT: Fine. Mr. Black didn't give any compelled  
12 testimony in Singapore as far as I'm aware.

13 MR. LEVINE: I understand, your Honor. My question  
14 though is: With all of this, what did the CFTC do? Did they  
15 continue to talk to the FCA about compelled testimony?

16 And with all of this great work they're doing in 2012,  
17 how does Mr. Prange end up in a proffer with Mr. King after  
18 taking Mr. Black's testimony?

19 So, I don't know the answers to these questions, but I  
20 know that you haven't been given even the questions. You have  
21 been told the CFTC has nothing to do with this because the  
22 government just rested without putting anything in for them.

23 And I am happy to show you more e-mails in which the  
24 CFTC, DOJ and the FCA are all strategizing about this case, not  
25 for the purposes of showing you anything other than it's a door



HCD7CONH

1 that remains open.

2 You also in Mr. Meaney's affidavit, you will notice,  
3 and his letter, he didn't mention anything about giving this to  
4 DFS. If you remember, DFS doesn't appear in Mr. Meaney's  
5 letter, nor does it appear in his affidavit. He didn't tell  
6 you, oh, by the way, Judge, I threw my notice with compelled  
7 testimony over to DFS in his letter or in his affidavit.

8 But it seems like the Department of Justice knew about  
9 that. Can they explained why that's not a relevant factor for  
10 this court to consider, whether or not another American  
11 agency -- in fact, a New York regulator -- got compelled  
12 testimony, and it's not in Mr. Meaney's letter, in his  
13 affidavit, his 302 report that we just got?

14 What about Bafin? They knew about that as well. No  
15 explanation of anything in any of this.

16 THE COURT: OK.

17 MR. LEVINE: Thank you.

18 THE COURT: Do you have anything else that you want to  
19 say in response to any of that? Then we're going to move on.

20 MS. SHAW: No, your Honor.

21 THE COURT: "No, your Honor" is a very good thing to  
22 say. Normally after "no, your Honor" sitting down is an  
23 excellent idea.

24 OK. So, now, Mr. Levine, you've done everything  
25 except address the question that I asked you to address 20

HCD7CONH

1 minutes ago, which was: How are we, in your view, how are we  
2 to proceed? We have a gentleman coming to us from London; he  
3 is going to be coming to us in the middle of a murder trial  
4 that I will be conducting, so it's not like I can bring  
5 everything to a screeching halt. But I'm accommodating him, so  
6 that is when I'm planning to take his testimony.

7 You have made the perfectly valid point that to the  
8 extent you want to put on a case -- of which you have given me  
9 some tantalizing tidbits, almost none of which relate directly  
10 to Mr. Black, but you tell me you have all kinds of e-mails  
11 that actually do relate to your client which you haven't shown  
12 me yet -- you want to do that after you hear from Mr. Prange.  
13 Right? That's what you said. So, I need to think through what  
14 we're going to do.

15 MR. LEVINE: That's correct, your Honor. You know, we  
16 have a variety of materials, some with Mr. Black. We also have  
17 other information we would ask you to draw an inference on.

18 I think there is a couple of things I would like. I'm  
19 very concerned, and I have talked to the taint team about this  
20 last night in an e-mail. I believe there is -- the government  
21 has said -- and they have been working hard at this. Some of  
22 these folks at the front table have worked very hard to get us  
23 materials, and I appreciate it, but it's very clear that  
24 although they say they're going to abide by their Jencks and  
25 Brady and Giglio obligations and 26.2 obligations, there is

HCD7CONH

1 more material out there.

2 If Mr. Meaney was talked to or discussed in August  
3 before he put in his letter, if these folks gave statements, if  
4 there is additional Brady on these people, we are entitled to  
5 it, respectfully, and I think they should produce it and should  
6 produce it immediately. We have been talking about this for  
7 months. I ask all Brady, Giglio and Jencks to be produced.

8 We did ask if there are other material on the  
9 affiants, if there are other statements here that they've made.  
10 And I will tell you, Judge, they have redacted wholesale  
11 materials, which here, "Meeting with Curtler's attorneys,"  
12 blacked out. First of all, that's going to be material which  
13 I'm entitled to anyway as 3500. Some of it has been turned  
14 over already from the trial team.

15 But there are other reports of meetings, for example,  
16 between Mr. Meaney, Mr. Powers, Ms. Saulino, that are all just  
17 blacked out, and they all relate to testimony that's relevant  
18 here.

19 Unless they are going to claim a privilege with the  
20 FCA -- and if they are, that's fine, they can do a log -- I  
21 want all of the statements, because people on every one of  
22 these documents are their affiants. I am entitled to  
23 statements that reflect what they've said. And I don't know  
24 who did the redaction job here; it's a horrible one. It's a  
25 tough job anyway, but I have so many documents that are totally

HCD7CONH

1      blacked out.

2               Here is one from March 25 which has the government --  
3      including members of the trial team -- the CFTC -- including  
4      the person that has been identified by the former chairman of  
5      the CFTC as the most important person to the CFTC's case --  
6      plus Mr. Prange, Mr. Clark, Mr. King and Mr. Meaney.

7               Can you pull this up. It's 192.

8               THE COURT: I can see.

9               MR. LEVINE: And it's blacked out. There was one  
10     little text that relates to Mr. Black.

11              Now, I have been told by the government that all this  
12     other information somehow is not relevant to the determination  
13     of the Kastigar matter. I respectfully think anything that  
14     these affiants have said, anything that's 3500, Brady material,  
15     is relevant. And I think I have shown today that there is some  
16     cause to be concerned. So, I would ask for immediate  
17     production of unredacted materials, and I would call for that  
18     immediately.

19              I also think to the extent that there are  
20     representations or statements that might cast doubt on any of  
21     the other affiants -- and I have suggested some places to look  
22     here -- that should be produced as well.

23              The government has every right in a Kastigar hearing  
24     to try to rely on affidavits, but if they do, then I have the  
25     same rights.

HCD7CONH

1 THE COURT: You do.

2 MR. LEVINE: So the one concern I have, Judge, is that  
3 with the timing of all of this, I think there is a lot more  
4 work for the government to do if they want to produce that. I  
5 am very concerned about the trial date here.

6 THE COURT: Oh, I am too. Oh, I am too.

7 MR. LEVINE: So, I would ask the court that if in  
8 fact -- you have a murder trial?

9 THE COURT: In January? Yes, I do.

10 MR. LEVINE: So I'm saying I don't think that  
11 Mr. Prange's testimony -- his direct might be ten minutes, but  
12 we intend to challenge --

13 THE COURT: Yes, I know, I did not anticipate that  
14 your cross would be 15.

15 MR. LEVINE: He might prove me wrong, and maybe we can  
16 all get out of here early, but I think it's going to be  
17 extensive.

18 I also think now, Judge, in light of this affidavit --  
19 this 302 from Meaney -- and in light of the fact that the  
20 government really can't proffer any evidence, I think there is  
21 a real question for you as to who we can accept affidavits from  
22 here. There is a question.

23 And if there is other material out there that might  
24 tend to cast doubt on this case -- I have some other material,  
25 Judge, which I don't think you want to hear today -- that does

HCD7CONH

1 not relate to Mr. Black -- to Mr. Black's testimony in the FCA.  
2 It does, however, relate to other portions of representations  
3 that have been made to this court that are central to this  
4 court's disposition of this matter and --

5 THE COURT: Of the Kastigar matter.

6 MR. LEVINE: Of the case itself. And it would tend to  
7 suggest that statements that have been made very recently to  
8 you are similarly inaccurate.

9 THE COURT: OK, I would like to focus my attention --  
10 I have a triage brain, you know, and it comes in, it goes out.  
11 I would like to focus my attention on the issue that's before  
12 me, which is the Kastigar issue concerning your client's  
13 compelled testimony.

14 Let me say a couple of things. First of all, yes,  
15 indeed the government has the right if it wishes to do so to  
16 proceed by affidavit, but that does not alter the fact that the  
17 defense, as far as I'm concerned anyway, is entitled to 3500,  
18 Brady, Giglio material for every one of those affiants, and  
19 that the government may find that the defense wishes to call  
20 some of those people on its case, or maybe not, because, as  
21 Mr. Levine keeps saying over and over again it is, after all,  
22 your burden. But it's certainly entitled to that information,  
23 just as it would be in any other pretrial hearing in a criminal  
24 case.

25 Second, it's clear that this matter is going to

HCD7CONH

1 require us to kick back the trial. You are scheduled to be  
2 here tomorrow, right? You're saying no but your team is saying  
3 yes. Mr. Breen says yes.

4 I need the trial team here. I need the trial team  
5 here. I need to have a conference with the trial team -- and  
6 we can get them in by telephone. If we have to get them in by  
7 telephone because they're in Washington, I don't care -- about  
8 a scheduling matter. I can't have that conversation today  
9 because I don't have the right people here, including but not  
10 limited to Mr. O'Neil, who could not be here this morning.

11 MR. LEVINE: We are happy to arrange the call, Judge.

12 THE COURT: We are on the calendar for 9:30 or 10  
13 o'clock. 9:30? We can't be on the calendar for 9:30 tomorrow.  
14 We can be on the calendar for maybe 10:30 tomorrow morning.

15 After listening to what I have listened to, I will say  
16 this: I understand why he does this, and he is doing a great  
17 job for his client, I think that Mr. Levine overcomplicates the  
18 discrete issue that needs to be established under Kastigar. I  
19 think the government probably has oversimplified as well by  
20 focusing on direct taint and not really apparently giving any  
21 serious consideration to the possibility of indirect taint.

22 Mr. Meaney's affidavit will be unsealed except for  
23 paragraph 9. But the portion of Mr. Meaney's affidavit that  
24 remains sealed needs to be addressed. We may be in a position  
25 to address it tomorrow, I don't know, at least in part, but it

HCD7CONH

1 raises some issues in my mind, especially in light of one of  
2 the e-mails -- perhaps it was Defendant's 90 -- that Mr. Levine  
3 showed me today, which is the e-mail from Mr. Meaney discussing  
4 the final notice.

5 As is always the case at the end of one of these  
6 conferences, I need to step back from it for about an hour and  
7 then get a copy of the transcript and revisit the whole thing  
8 and try to figure out what just went on, so I'm going to do  
9 that. I will see you tomorrow.

10 MS. SHAW: Your Honor, the government just has one  
11 point we wanted to raise with respect to the matter of Jencks  
12 and 26.2.

13 While we agree with the court that certainly our Brady  
14 and Giglio obligations apply in this pretrial motions hearing,  
15 it's the government's position -- and we're happy to submit  
16 case law and briefing on this -- that the Jencks Act does not  
17 apply in this setting nor does 26.2.

18 We have gone through the terms of the Jencks Act as  
19 well as 26.2, and there is no applicable provision that Jencks  
20 applies in this setting.

21 Certainly, as I said, Brady and Giglio apply. So to  
22 the extent we have Brady and Giglio, we will continue to  
23 provide that as required. But Jencks, in our view -- and I  
24 believe under the case law -- and we have a cite that I could  
25 provide afterwards which indicates that affiants do not give



HCD7CONH

1 rise to an obligation to turn over Jencks in a pretrial  
2 setting.

3 THE COURT: All right.

4 MR. LEVINE: May I address that very briefly?

5 Your Honor, the government has represented to me  
6 previously they were going to abide by their Jencks  
7 obligations, and in fact have never suggested --

8 THE COURT: This part of the government or the trial  
9 team?

10 MR. LEVINE: These folks. And they have been sending  
11 me statements on it. So, I think that's inconsistent with what  
12 their letters have said to me. But let's forget that for a  
13 second.

14 26.2 provides that Jencks does apply for suppression  
15 hearings. Part of the relief I'm seeking here, if not  
16 dismissal, is suppression of all tainted statements including  
17 that of Mr. Curtler's and Mr. King's. This is therefore in the  
18 nature of a hearing that is covered by 26.2 and therefore  
19 Jencks, and that is consistent with the government's previous  
20 position.

21 I understand that now that they've seen that their  
22 witnesses have been impeached Jencks is an inconvenient rule  
23 for them, and so is 26.2. But given that it's a suppression  
24 hearing in part, I respectfully submit the government's  
25 position is not well founded. In any event, the overwhelming

HCD7CONH

1 fairness of these proceedings requires it.

2 If in fact they won't be provided, and they will not  
3 give me Jencks, then I move under 612 and under general  
4 principles that every affidavit in this matter be struck and  
5 this matter be held by interrogation, because the court can  
6 have no confidence based on the record developed today that we  
7 have addressed this most serious constitutional issue. Thank  
8 you so much for indulging me, your Honor.

9 THE COURT: See you tomorrow morning.

10 (Adjourned)